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No. 17,762

IN THE

United States Court of Appeals

For the Ninth Circuit

PAUL JOHN CARBO, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT GIBSON'S OPENING BRIEF

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STATEMENT DISCLOSING BASIS OF JURISDICTION

On or about September 22, 1959, a special grand jury in the Southern District of California returned an indictment against Truman Gibson, Jr., and four other persons (Tr. I, 2-16).[1] Though the indictment contained ten counts Mr. Gibson was charged in only two, Counts One and Five. Count One charged all defendants, and one William Daly who was not indicted, with conspiring willfully to obstruct, delay and affect interstate commerce by means of extortion

[1]Reference is to the volume and page of the Transcript of Record which is in six volumes. The Reporter's Transcript of Proceedings will be referred to as "R. Tr." followed by the page number.

in violation of the Hobbes Act, 18 U.S.C. § 1951. Count Five charged all defendants and Daly with conspiring, willfully and with intent to extort, to transmit threats in interstate commerce in violation of 18 U.S.C. §§ 371 and 875(b). In other respects there is no material difference between Counts One and Five and all of the means and overt acts alleged in Count Five, save one of the latter, are repetitions of the allegations in Count One. In the other eight counts of the indictment the other defendants, except one, were charged with one or more substantive violations of the same statutes.

The cause was assigned to the Honorable Ernest A. Tolin, then one of the judges of the United States District Court for the Southern District of California and all of the proceedings to the time of his death were conducted by him.

On October 9, 1959, Mr. Gibson entered a plea of not guilty as to each of Counts One and Five with leave granted to him to file a motion to dismiss and other motions thereafter (Tr. I, 61).

A motion on behalf of Mr. Gibson to dismiss the indictment (Tr. I, 77-78), supported by a memorandum brief (Tr. I, 79-126), was filed. A motion for a bill of particulars (Tr. I, 152-153), and a motion for a separate trial based on the joinder of eight substantive counts in the indictment in which Mr. Gibson was not named with two conspiracy counts in which he was (Tr. I, 192-193) were also filed. All of these motions were denied (Tr. I, 210).

The court thereupon set the matter for trial on December 8, 1959. On motion of one or another of the parties, including the prosecution, the date for trial was continued from time to time to February 21, 1961.

On February 9, 1961, there was filed on behalf of Mr. Gibson a second motion to dismiss the indictment based on the conduct of the prosecution (Tr. II, 416-425). On February 16, 1961, the prosecution filed a motion to strike that motion to dismiss and an opposition thereto supported by certain affidavits (Tr. II, 446-472). Hearing on that motion to dismiss was begun on February 20, 1961, and was continued to the afternoon of the same day for taking evidence on the motion. In the afternoon the court refused to receive any evidence and denied the motion to dismiss with leave to raise the questions presented at another time (Tr. II, 474, R.T. 17-19).

The trial commenced on February 21, 1961, and continued from day to day before Judge Tolin, to May 30, 1961, when the jury returned verdicts of guilty as to all defendants on all counts (Tr. IV, 951-961).

Post-trial motions for a new trial (Tr. IV, 968-972) and for judgment of acquittal (Tr. IV, 973-974) were filed on behalf of Mr. Gibson on June 2, 1961, and were set for hearing on July 20, 1961 (Tr. IV, 980). In addition to being based on matters involved in the conduct of the trial these motions incorporated by reference the earlier two motions to dismiss in-

cluding the issues of the motion to dismiss which the court had refused to hear on February 20, 1961. In accordance with leave of court obtained, memorandum and points of authority in support of these motions were filed on June 26, 1961 (Tr. IV, 1088-1108).

On June 11, 1961, Judge Tolin passed away. On June 19, 1961, a supplemental motion for new trial was filed on behalf of Mr. Gibson based on the ground that a successor judge could not provide substantial justice and due process of law in passing on the pending post-trial motions (Tr. IV, 988-997).

On June 26, 1961, the Honorable George H. Boldt, United States District Judge for the Western District of Washington being generally assigned to sit in the Southern District of California was assigned this cause (Tr. IV, 1094). On July 24, 1961, Judge Boldt heard oral argument in support of the post-trial motions. The prosecution again moved to strike those portions of the motions to dismiss based on the conduct of the prosecution and charged defense counsel with misconduct (Tr. V, 1208-1213; R. Tr. 7983). At the direction of the court (Tr. V, 1323), counsel for Mr. Gibson filed a response to the prosecution's motion (Tr. V, 1220-1255).

On October 16, 1961, Judge Boldt denied the supplemental motion for new trial (Tr. VI, 1312-1314). Similarly, on November 29, 1961, Judge Boldt filed a memorandum finding that there was no prejudicial error in the conduct of the trial and set the matter for December 2, 1961 (Tr. VI, 1446). On that latter

date Judge Boldt sentenced Mr. Gibson to five years each on Counts One and Five with a fine of $10,000.00 on Count One, the sentence to be concurrent and imposition of imprisonment only suspended and placed him on probation for five years subject to the usual conditions and that the fine imposed be paid promptly (Tr. VI, 1500).

With respect to the motion based on the conduct of the prosecution and the prosecution's motion to strike a portion of that motion, the court first refused to pass on the matter prior to entry of sentence and then after the entry of sentence the court concluded that the matter had become moot, that he found no misconduct on the part of the defense counsel and declined to act on the prosecution's motion to strike (Tr. VI, 1491).

Notice of appeal on behalf of Mr. Gibson was filed on December 4, 1961 (Tr. IV, 1521-1524).

THE FACTS

Truman K. Gibson, Jr., is and has been for many years a resident of the City of Chicago, County of Cook, State of Illinois and a citizen of the State of Illinois and the United States (R.T. 4289). He is married and the father of one child. Following his graduation from the University of Chicago Law School in 1935 he was admitted to the bar of the State of Illinois in the same year and he continues to be a member of that bar (R. Tr. 4289). From 1935

to 1940 he engaged in the practice of law in the City of Chicago. In 1940 he was appointed Assistant Civilian Aide to the Secretary of War and in 1941 was appointed Civilian Aide to the Secretary of War charged with the duty and responsibility of advising the Secretary of War and the Assistant Secretary of War on matters concerning Negro troops and Negro civilian personnel of the War Department (R. Tr. 4290). He continued in that post until the conclusion of the war with Japan in 1945 and for those services he was awarded the Medal for Merit. Thereafter he resumed the practice of law in the City of Chicago (R. Tr. 4290).

In 1949 Mr. Gibson became associated as Secretary with the then newly formed International Boxing Club of New York and the International Boxing Club of Illinois (R. Tr. 4289-4290). The business of the International Boxing Clubs was the promotion of fights in arenas owned by those promotional companies or affiliated corporations, and arrangement for the presentation of televised boxing bouts on Wednesday and Friday nights in those arenas and others throughout the United States (R. Tr. 4290). The producer of the Friday night fights telecast over the National Broadcasting Company television and radio networks was the Maxon Advertising Agency, a New York corporation not otherwise affiliated with the International Boxing Clubs. Mr. Gibson had no interest in the Maxon Agency. The American Broadcasting Company telecast the Wednesday night fights which were produced by Lester M. Malitz, Inc., and

neither Mr. Gibson nor the International Boxing Clubs or any of their affiliates owned any stock in that producing company (R. Tr. 4297).

Each of the television contracts was a 52 week contract except for years in which Christmas or New Year's Day fell on Wednesday or Friday (R. Tr. 4298). Thus IBC was responsible for putting on at least 102 and probably 104 main events for television each year. For each of the main events promoted directly by IBC, about half of the annual total, those companies also were obliged to arrange supporting cards of from three to five bouts. In more than ten years of operation, IBC never failed to produce a fight to meet its television obligations and the outcome of no such fight was ever predetermined or "fixed" (R. Tr. 4766, 4780).

The production costs to the sponsors of the Wednesday night fights ran from seventy-five to eighty thousand dollars per week, and as high as one hundred fifteen thousand dollars per week to the sponsors of the Friday night fights (R. Tr. 4307-4308). The International Boxing Clubs received a weekly fee from each series of approximately twenty thousand dollars per week to cover their costs of operation and arrangements with local promoters and fighters. Each contestant in a main event was paid a minimum of four thousand dollars, and each fighter in a semi-final bout was paid fifteen hundred dollars (R. Tr. 4307-4308). On telecast bouts originating outside New York or Chicago, the promoter in whose club the bout was held would receive a minimum of four thousand

dollars in addition to the amounts paid to the fighters (R. Tr. 4308). Amounts paid for world championship matches and other outstanding contests were determined by negotiation between IBC, the producers, sponsors and networks (R. Tr. 3873). Advances by IBC to fighters, managers and other promoters was a characteristic of the business. The total of such advances outstanding at any time ranged from one hundred and seventy-five thousand dollars to two hundred and seventy-five thousand dollars (R. Tr. 5288).

The producers had the power and authority to approve or reject the site of scheduled fights both because of financial and technical considerations arising from the feasibility of telecasting and the cost and availability of necessary telephone lines and television equipment. Basically, fights had to be arranged roughly eight weeks in advance and it was the responsibility of IBC to provide a substitute if for any reason a scheduled fight could not be held (R. Tr. 3877-3878). All fights scheduled had to be approved by the state commission of the state in which the fight was held (R. Tr. 4324).

The stock of the International Boxing Club of New York was wholly owned by the Madison Square Garden Corporation (R. Tr. 4291). The stock of the International Boxing Club of Illinois was owned by Mr. Arthur M. Wirtz and Mr. James D. Norris, Chicago businessmen and owners of the Chicago Stadium, or corporations that they owned and controlled (R. Tr. 4291). Mr. Gibson owned no stock in either of the International Boxing Clubs and except

for a few shares of Madison Square Garden Corporation stock which he owned for about six months in 1948, he never owned stock in any company affiliated with either the International Boxing Clubs, Chicago Stadium Corporation or the Madison Square Garden Corporation (R. Tr. 4290-4291).

The affairs of the International Boxing Club of New York were under the direction of its Board of Directors consisting of four persons, General John Reed Kilpatrick, long-time President of Madison Square Garden Corporation, Ned Irish, Executive Vice-President of Madison Square Garden Corporation, Mr. James D. Norris and Mr. Gibson (R. Tr. 4305). In 1958, Mr. Norris was replaced on that board by Mr. Francis Heazell, treasurer of the Knights of Columbus (R. Tr. 4305).

The International Boxing Club of Illinois was under the direction of a board of directors consisting of Mr. Wirtz, Mr. Norris and Mr. Gibson (R. Tr. 4305).

Mr. Gibson ran the Wednesday night fights from Chicago arranging most of the matches for television himself and supervising a matchmaker who arranged the supporting cards, and he was responsible for overseeing the New York operation where there was a matchmaker, assistant matchmaker and a managing director (R. Tr. 4298). A single main event would necessitate consideration of at least four or six opponents and managers and discussions with and about them (R. Tr. 4300). In the course of arrang-

ing these bouts Mr. Gibson carried on from four to five hundred conversations per year with fight managers and promoters throughout the country, mostly by telephone. He maintained an office at Madison Square Garden in New York where he spent about four days per week, and another office in the Chicago Stadium (R. Tr. 4299).

In performance of his duties Mr. Gibson was directly responsible to each of these boards and he reported daily to Mr. Norris who was a member of both boards and to Mr. Irish, then executive vice-president of Madison Square Garden (R. Tr. 4307).

In 1958, when Mr. Norris had a heart attack and resigned as president of the two International Boxing Clubs, the boards of directors of the two parent companies, the Chicago Stadium Company and the Madison Square Garden Corporation named Mr. Gibson as president (R. Tr. 5290). At that time the board of Madison Square Garden Corporation was composed of General John Reed Kilpatrick, chairman; Mr. Arthur M. Wirtz, vice chairman; Mr. Ned Irish; Mr. Francis Heazell, treasurer of the Knights of Columbus; Mr. Daniel R. Topping, president of the New York Yankees; Mr. J. Arthur Friedlund, secretary and counsel for the New York Yankees; Mr. William H. Burke, vice-president, Chicago Stadium Corporation; and Mr. August Bush (R. Tr. 5291, 5300). The board of directors of the Chicago Stadium Corporation was composed of Mr. Arthur M. Wirtz; his son William; Mr. James D. Norris; and Mr. Charles E. Dwyer (R. Tr. 5292).

In the performance of his duties, Mr. Gibson was responsible to these boards of directors respectively and he was required to make, and did make, reports to these directors at regular intervals; monthly in the case of the Madison Square Garden Corporation which was listed on the New York Stock Exchange and was therefore obliged to hold regular monthly meetings, and more frequently to Mr. Norris and Mr. Wirtz in connection with the activities of the Chicago Stadium Corporation and the International Boxing Club of Illinois (R. Tr. 5293). The books and records of all of these enterprises were regularly kept in the ordinary course of business, were regularly audited and the auditors made regular reports to the several boards (R. Tr. 4306).

Throughout his association with these enterprises Mr. Gibson was a salaried employee with no proprietary interest in them (R. Tr. 5287). Similarly, he never had any interest in any fighter or managerial contract with any fighter (R. Tr. 4326).

In addition to his business activities with these firms, Mr. Gibson maintained a private law office in Chicago and served as a member of the board of directors of Supreme Life Insurance Company of Chicago, and on the boards of various other business, social and philanthropic organizations. It stands uncontradicted that his character and reputation for truth and veracity are excellent (R. Tr. 5147, 5282, 5303, 5311).

In connection with his activities with boxing promotions Mr. Gibson met and dealt with hundreds of

fight managers, fighters, promoters, matchmakers, sports writers, and state boxing commission officials and employees throughout the United States. Among these were Jack Leonard who when Mr. Gibson first met him was Assistant matchmaker at the Hollywood Legion Stadium in Los Angeles (R. Tr. 4294). Leonard subsequently became matchmaker at the same club (R. Tr. 4294). Similarly Mr. Gibson met and dealt with Don Nesseth, manager of record of Don Jordan, and Jackie McCoy, himself once a fighter and later a second, assistant matchmaker, and co-manager with Don Nesseth of Don Jordan (R. Tr. 4477-4478). Under the law of California a licensed matchmaker was prohibited from serving as manager of a fighter, but McCoy did, and Leonard regularly engaged in negotiation of matches for Don Jordan (R. Tr. 4476).

The Hollywood Legion Stadium owned by the American Legion Post of that city had been a well-known and popular boxing club for many years operated by the Post (R. Tr. 4320). Early in 1958, however, financial difficulties led the Hollywood Legion Post to decide to abandon its promotion of boxing (R. Tr. 4313-4314). At that time Jack Leonard approached Mr. Gibson and urged him to arrange to have the promotional enterprises with which he was connected take over the operation of the Hollywood Legion Stadium. Mr. Gibson informed Leonard that he and his associates were not interested in the direct promotion of boxing in the Hollywood Legion Stadium but he arranged for a telecast origination

from the Stadium in order to help alleviate the financial difficulties (R. Tr. 4314).

Reluctant to see this popular, much-publicized club lost to the sport of boxing, Mr. Gibson discussed the matter with George Parnassus, long-time matchmaker of the Olympic Boxing Club, another Los Angeles fight promoter, and William Daly a long-time fight manager and an official of the Boxing Managers Guild who had close personal and business contacts with Mr. Edward Underwood, Chairman of the Board of the Hollywood Legion Post (R. Tr. 4315-4318). Other discussions with Jack Leonard and representatives of the California Athletic Commission followed, and in October, 1958 the International Boxing Clubs agreed to advance $28,000 for a lease deposit of $25,000 on the Hollywood Legion Stadium and working capital to a corporation to be formed by Jack Leonard with all of the stock to be owned by him. In addition, George Parnassus advanced $10,000 (R. Tr. 4329). That organization, designated the Hollywood Boxing and Wrestling Club, began to promote boxing in the Stadium under Leonard's direction and supervision in November 1958 (R. Tr. 4330).

It was understood that Leonard was to rely upon the advice and assistance of Parnassus in promotional activities, and in order to conserve the limited funds of the enterprise, no major expenditures were to be made without notice to Mr. Gibson, although his signature was not required on checks drawn on the bank account of the Hollywood Boxing and Wrestling Club (R. Tr. 4332-4333). The money advanced

by IBC was to be repaid from the promoter's share of television originations from the Hollywood Legion Stadium.

Almost immediately the Hollywood Boxing and Wrestling Club encountered financial difficulties and Leonard became actively involved in controversy with Parnassus (R. Tr. 4370). By early 1959, the situation had become acute. The Legion Post was threatening to terminate the lease on the premises for nonpayment of rent and cancellation of the performance bond of the club, required by the California Commission, was threatened (R. Tr. 4595-4596). Leonard's promises to pledge the stock of the club to secure the advances had not been kept. Parnassus demanded repayment of his advances. Mr. Gibson made numerous calls to Los Angeles and several trips there in an effort to bolster the flagging operation. He arranged for Leonard to borrow $10,000 from one Ladell Tucker to repay Parnassus; he persuaded the Hollywood Legion Post to provide collateral security for the required performance bond by Leonard and he initiated discussions looking to a business combination of the Olympic Boxing Club and the Hollywood Boxing and Wrestling Club with its principals, Cal and Eileen Eaton, and Mr. Jamie K. Smith, one of the members of the California Athletic Commission (R. Tr. 4600-4606). Similarly, he asked William Daly to go to Los Angeles in May, 1959, to investigate the operation of the Hollywood Boxing and Wrestling Club and to determine what actions, if any, could be taken to improve its operations (R. Tr. 4660). At the

same time Mr. Gibson pressed Leonard and his attorney, Mr. Kenneth Lynch, to execute the necessary documents to evidence the debt of the Hollywood Boxing and Wrestling Club for advances and to pledge the stock of the club as security as had been promised (R. Tr. 4668).

In December, 1958 Leonard raised with Mr. Gibson the possibility of a telecast of a fight to be held in Porterville, California, in connection with a sports day affair being planned in that community (R. Tr. 4553). Gibson undertook to make necessary inquiries of the producer as to the feasibility of a Porterville origination on or about April 15, 1959 (R. Tr. 4560). In January, 1959 Leonard and Gibson discussed Gaspar Ortega and one of the Moyers from Portland, Oregon as possible contestants. Leonard was to promote the fight as an individual. He was to receive the customary four thousand dollar minimum promoter's fee plus two thousand dollars from the local sponsoring group, or a total of six thousand dollars (R. Tr. 4561).

Early in February, 1959, Leonard called Mr. Gibson in New York to inquire about the proposed Porterville fight. Mr. Gibson told Leonard that an answer had not yet been received from Mr. Malitz, the producer. Leonard said he was anxious to get the matter settled so that he could get an advance of eighteen hundred dollars on the promoter's fee to pay Palermo money Leonard said he owed him (R. Tr. 4563-4567). Gibson told Leonard he could not arrange for an advance on a Wednesday night from New York

because that series was run from Chicago. A few days later Leonard called Mr. Gibson in Chicago and he agreed to make the requested advance against the proposed Porterville fight, and he drew the requisite voucher for issuance of a check to Leonard in the desired amount (R. Tr. 4568-4573).

Two days later Leonard called Mr. Gibson in Miami, Florida to inquire about the check. Gibson told him he assumed that it had been mailed and that Leonard should receive it in a day or two. Leonard then asked Gibson to so inform Ogilvie, the Hollywood Boxing and Wrestling Club bookkeeper, and to authorize him to issue a check of that organization to Leonard so he could cover a bank overdraft and replace the money when the Chicago Stadium check arrived. Gibson did so (R. Tr. 4573-4575).

Subsequently, Malitz refused to approve the Porterville fight because of the costs and difficulties of arranging a telecast there (R. Tr. 3892-3893). Both Leonard and Nesseth were angry and dissatisfied when Malitz communicated his decision to them in mid-March, 1959 (R. Tr. 3894-3895).

Meanwhile, as early as August, 1958, Mr. Gibson had sought to arrange a bout for the world's welterweight championship to be telecast on the Friday night series in early December with one of the managers of the then welterweight champion, Virgil Akins (R. Tr. 4443). He was managed by Bernie Glickman of Chicago and Eddie Yawitz of St. Louis. No opponent had been selected nor had the site of

the bout been determined and, of course, no contracts had been signed (R. Tr. 4443). In October, however, the Olympic Boxing Club promoted a welterweight bout between Gaspar Ortega and Don Jordan at Long Beach, California. With the approval of the California Athletic Commission the bout was billed as an elimination for the right to fight for the welterweight championship (R. Tr. 4454). Don Jordan was the winner and the day after the fight Mr. Gibson began negotiations with Leonard, Nesseth and McCoy for an Akins-Jordan fight for the championship to be held on December 5, 1958, in Los Angeles, under the promotion of the Olympic Boxing Club (R. Tr. 4453). In the course of that conference Leonard told Mr. Gibson that Palermo, one of the other defendants, said there would be no fight unless he, Palermo, got a part of the manager's share of Jordan's purse (R. Tr. 4473).

Mr. Gibson had known Palermo through his activities in the boxing business as manager of a number of fighters including several world's champions (R. Tr. 4364-4365). Mr. Gibson informed Leonard, Nesseth and McCoy that Palermo had nothing to do with the matter and that if they wanted a championship fight for Jordan they could have it (R. Tr. 4473). Later the same day Mr. Gibson met with Leonard, his lawyer Lynch, one James Ogilvie, an employee of the Hollywood Legion Stadium, and Parnassus to complete their plans for Leonard's organization of the Hollywood Boxing and Wrestling Club (R. Tr. 4432).

Jordan fought Akins and won the title from him. Under the terms of the original contract for the first Akins-Jordan fight, Akins was promised a rematch in the event that he was the loser, with the site of the bout to be St. Louis, Akins' home town (R. Tr. 4352).

In January, 1959 Jordan fought one Alvaro Guttirez in a non-title match under the promotion of the Olympic Boxing Club (R. Tr. 4338). The bout was not telecast. The IBC had no contract with the promotion. About that time Mr. Gibson learned that Don Nesseth was threatening to refuse to go through with the return bout with Akins. Another conference in Los Angeles between Leonard, Nesseth, McCoy and Gibson ensued (R. Tr. 4347-4348). By dint of agreeing to pay the transportation for six persons from Los Angeles to St. Louis for Nesseth and to make an advance of $2,500, Mr. Gibson persuaded Nesseth and Leonard to perform on their promise of a return match for Akins with Jordan (R. Tr. 4352).

That return bout was finally held in St. Louis on April 25, 1959, under the promotion of Sam Muchnick (R. Tr. 4613). By this time, pursuant to a court order, the International Boxing Clubs of New York and Illinois had been severed. Mr. Gibson had become head of the Boxing Division of the Chicago Stadium Corporation and had terminated his connections with the New York promotional activities. The Chicago Stadium Corporation had no connection with the second Akins-Jordan fight. It was telecast by ar-

rangement of Madison Square Garden with which, by then, Mr. Gibson had no connection (R. Tr. 4613).

A few days later Mr. Gibson learned that fighters had not been paid transportation in connection with a telecast fight at the Hollywood Legion Stadium and that there was a report that Nesseth had entered into an agreement with one Cus D'Amato, under the terms of which Nesseth was turning control of his fighters over to D'Amato. D'Amato was, and is, the manager of Floyd Patterson, heavyweight champion of the world (R. Tr. 4622). Though Mr. D'Amato had been indebted to the International Boxing Clubs for advances in the amount of $26,000 for some years he had consistently refused to permit Patterson to fight under the promotion of the International Boxing Clubs. Mr. Gibson called Leonard long distance about these matters and made arrangements to meet with Nesseth to discuss the matter in Chicago on May 2, 1959. Nesseth did not keep that engagement. Instead, on May 3, 1959, Leonard and Nesseth called Mr. Gibson by telephone and told him that they were being threatened by Palermo who was in Los Angeles and asked Mr. Gibson to make Palermo leave Los Angeles. Mr. Gibson told them that he had no control over Palermo and if they were being threatened by anyone they should "run, not walk" to the nearest law enforcement officers (R. Tr. 4635-4641).

About ten days later Mr. Gibson was subpoenaed to appear before the California Athletic Commission to testify with respect to these matters. He appeared and did so testify (R. Tr. 4673).

Similarly, after the indictment involved here was returned, Mr. Gibson made a statement of several hundred pages to the United States Attorney in the Southern District of California (R. Tr. 4673-4674). Likewise he appeared before the Kefauver Committee of the United States Senate in December, 1960, and testified at length concerning his activities in the boxing business.

Mr. Gibson never knew, saw or heard of Joseph Sica or Louis Tom Dragna prior to the return of this indictment (R. Tr. 4678-4679). Mr. Gibson had met Frank Carbo shortly after Mr. Gibson became associated with International Boxing Clubs. Over an eight or nine year period he had talked to him on only a few occasions usually by telephone and had not talked to him at all from about the spring of 1958 until after the hearing before the California Athletic Commission in May of 1959 (R. Tr. 4755-4757).

Neville Advertising Agency, a corporation in which Mr. Gibson had no interest but which was affiliated with the International Boxing Clubs made payments of approximately $40,000 to Mrs. Carbo between 1954 to 1957. These payments were made at the direction of Mr. Norris but Mr. Gibson knew of them. Likewise similar payments were made to Jack Kearns, an old-time fight manager. The payments were made to avoid antagonizing managers and fighters friendly to Carbo or Kearns. The payments were duly recorded, taxes were deducted, and no effort was made to conceal the fact that they were made (R. Tr. 4763-4767).

Mr. Gibson never made any threats of any kind, economically or otherwise, to Jack Leonard, Don Nesseth or anyone else (R. Tr. 4679). He never personally profited from any part of the purses of Don Jordan or any other fighter (R. Tr. 4677). He discontinued his connection with the boxing business in the fall of 1960 when the Boxing Division of the Chicago Stadium Corporation was dissolved.

ABSTRACT OF THE STATEMENT OF THE CASE PRESENTING QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED

Appellant's contentions on this appeal involve the failure of Count One of the indictment to state a public offense, the insufficiency of the allegations of Count Five as to venue, and the insufficiency of the evidence to sustain a conviction as to those counts, issues which were raised by timely motions to dismiss and by motions for judgment of acquittal.

There is also a claim of denial of a fair trial for various reasons all of which issues were raised by timely objections, motions to strike, motions for judgment of acquittal and motion and supplemental motion for new trial.

SPECIFICATIONS OF ERRORS RELIED UPON

1. The evidence is insufficient to sustain a conviction as to Counts One and Five of the indictment.

2. Neither Count One nor Count Five of the indictment sufficiently alleges a federal offense.

3. The court erred in denying the motion of appellant for a dismissal as to Counts One and Five of the indictment at the close of the prosecution's case.

4. The court erred in admitting into evidence and in denying appellant's motion to strike all of those matters specified in that motion (Tr. 784).

5. The court erred in failing to provide appellant a fair, impartial and speedy trial.

6. The court erred in finding that a successor judge could satisfactorily perform post-verdict duties.

7. The court erred in denying appellant's motion for judgment of acquittal.

ARGUMENT OF CASE

SUMMARY

Counts One and Five of the indictment are fatally defective. Count One does not allege a federal offense because it contains no allegations as to effect on interstate commerce. Count Five does not contain required

allegations as to venue because the termini of the alleged communications are not alleged. Both counts are vague and indefinite.

The evidence as to appellant fails to prove beyond a reasonable doubt that he was a party to any conspiracy as alleged in Count One. There is no evidence to support the conviction of appellant as to Count Five.

The form of the indictment, misjoinder of defendants, conduct of the prosecution, conduct of the trial and post-verdict action by a successor judge combined to deny appellant a fair trial in violation of rights protected by the Constitution of the United States.

A. DEFECTS IN THE INDICTMENT

Counts I and V of the indictment (Tr. 17) are set forth in full in an Appendix to this brief. Each of those counts is fatally defective. Count I failed to allege an offense cognizable as a matter of law in the courts of the United States. Each count is so vague and indefinite that it fails to satisfy the requirements of Rule 7 of the Federal Rules of Criminal Procedure. Finally, Count V does not contain the requisite allegations as to venue.

1. Count I Does Not Allege a Federal Offense.

Count I of the indictment charges that Mr. Gibson and others, in violation of Title 18, § 1951, U.S.C., conspired to obstruct interstate commerce by means of extortion from Nesseth and Leonard of a share of

the fight purses of Don Jordan and control of the same fighter. Both the legislative history and the judicial decisions construing that statute, commonly known as the Hobbes Act, make it clear that in adopting it Congress was exercising its power under the Constitution of the United States to deal with interstate commerce. It is equally clear that the statute was intended to deter and punish illicit use, and threats of illicit use, of union strength against employers for the personal gain of labor leaders with the inevitable resulting burden on interstate commerce if such commerce was involved in the particular situation. *United States v. Green,* 350 U.S. 415 (1956).

The relationship between Nesseth and Leonard on one hand, and Don Jordan on the other, whatever it was (and the indictment is silent on the matter), is not interstate commerce nor is the purse of a single fighter interstate commerce.

In *United States v. International Boxing Clubs,* 348 U.S. 236, 240 (1955), the Court ruled that the promotion of professional boxing contests on a multistate basis, coupled with sale of rights to televise, broadcast and film the contest for interstate transmission, constituted "trade or commerce among the several states" within the meaning of the Sherman Act. The Court then pointed out, however:

> "A boxing match—like the showing of a motion picture . . . or the performance of a vaudeville act . . . or the performance of a legitimate stage attraction . . . 'is of course a local affair.' But

> that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business itself engaged in interstate commerce, or if the business imposes illegal restraints on interstate commerce. Apart from Federal Baseball and Toolson, it would be sufficient, we believe, to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television, and motion picture rights."

In this case the indictment contains no such allegations as the Court found necessary in the *International Boxing Club* Case. It was these allegations which served to distinguish *Toolson v. New York Yankees,* 346 U.S. 356 (1953), and *Federal Baseball Club v. National League,* 259 U.S. 200 (1922). In the *Toolson* Case, by *per curiam* opinion the Court squarely held that the validity of contracts between baseball players and their respective employers is outside the scope of federal jurisdiction, relying upon a similar view as to the relationship between major leagues in the *Federal Baseball* Case.

Equally significant, in *Shall v. Henry,* 211 F.2d 227 (C.A. 7th, 1954), the Court held that a licensed manager of a boxer could not bring an action under the Sherman Act for treble damages against the co-managers in various boxing groups because the business of presenting boxing matches did not constitute interstate commerce finding no distinction between a baseball game and a boxing match, relying upon the cited decisions of the United States Supreme Court. Sig-

nificantly, the *Shall* Case was called to the attention of the Supreme Court in the *International Boxing Club* Case and it was not overruled or distinguished. See 348 U.S. 236, 242.

In light of these precedents we respectfully submit that it is clear that a contract between one fighter and his manager or managers does not constitute interstate commerce. Accordingly, Count I is fatally defective because there is no other allegation which can be construed as describing any matter in interstate commerce.

2. Vagueness and Indefiniteness of Counts I and V.

Rule 7(c) of the Federal Rules of Criminal Procedure provides: "The indictment . . . shall be a plain, concise and definite statement of the essential facts constituting the offense charged." Although Rule 7 relaxed many of the technical requirements formerly imposed as to indictments, it re-expressed the fundamental requirement that an indictment must plainly and definitely charge every essential element of the offense charged. Thus Rule 7 codified the requirement well recognized ever since the decision in *United States v. Cruikshank,* 92 U.S. 542, where the Supreme Court said:

> "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged so that it may de-

> cide whether they are sufficient in law to support a conviction if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

The failures of Counts I and V to satisfy these requirements are numerous. Count I fails to allege any facts showing how interstate commerce was to be delayed, obstructed or affected by the alleged conspiracy. Count I likewise fails to allege how threats directed to Nesseth and Leonard could accomplish the object of the conspiracy even if its object were to obstruct interstate commerce since there is no allegation of the relationship, if any, between Nesseth, Leonard and Jordan, and no allegation as to the rights of Nesseth or Leonard to control Jordan or share his purses. Trial and verdict cannot cure these defects, nor can inference or innuendo cure this count. This is particularly true because in California the whole matter of relationship between fighters and managers is controlled by state law. See Calif. Code, Division 8, Ch. 2, Business and Professions Code, as added by Stats. 1941, Ch. 45 as amended §§18674 and 18682 and rules adopted by the Athletic Commission of California in accordance therewith.

Similarly Count V fails to allege what agency of interstate commerce, if any, was to be used to convey the alleged threats and there is no allegation as to the points between which the threats were to be communicated. See, e.g., *Asgill v. United States,* 60 F.2d

780 (C.A. 4th 1932), and *United States v. Grunberg,* 131 Fed. 137 (C.A. 1st 1904), where the Court enunciated this long-standing rule in the following language:

> "According to the settled practice on indictments for conspiracy, whether the means to be employed are in themselves lawful or unlawful, it is not sufficient to merely allege in such general terms that the defendants have conspired to defraud. The indictment must allege, to some extent at least, the means intended to be used in defrauding."

As this Court pointed out in *Elder v. United States,* 142 F. 2d 199 (C.A. 9th, 1944):

> "An indictment is a formal accusation of a person charging that he has committed an illegal act which is denounced by the sovereign as a crime. It must indicate the crime charged, and it must contain a statement of the essential elements of the indicated crime. It must include a recital of the acts alleged to constitute the defense in detail sufficient to bring them within the scope of the offense and sufficient to inform the accused generally of the acts attributed to him and the time of their commission, so that he may be safeguarded against double jeopardy."

When the vague generalizations contained in both Counts I and V of this indictment are considered alone or against the background of the trial it is apparent that neither count satisfies fundamental legal requirements.

3. Count Five Does Not Contain the Requisite Allegations as to Venue.

It has been uniformly held that the requisite venue must be both alleged and approved by the Government, because the Sixth Amendment to the Constitution of the United States guarantees to the accused the absolute right to a public trial by an impartial jury of the state and district wherein the offense is alleged to have been committed. *United States v. Dean,* 246 F. 2d 335 (8th Cir.); *United States v. Provoo,* 215 F. 2d 531 (2nd Cir.). Under Article Third of the Constitution of the United States, the Congress has the authority to define the jurisdiction, including venue, of the inferior Federal courts. From time to time, the Congress has exercised this authority by adoption of venue statutes of general applicability and by the adoption of venue statutes applicable with respect to particular offenses.

One such statute is applicable here. That is 18 U.S.C. § 3239. It provides:

> "Any defendant indicted under sections 875, 876 or 877 of this title, with respect to communications originating in the United States, shall, upon motion duly made, be entitled as of right to be tried in the district in which the matter mailed or otherwise transmitted was first set in motion, in the mails or in commerce between the States."

Though Count V purports to be under both Sections 371 and 875 of Title 18 U.S.C., the gravamen of the offense charged is violation of Section 875 because without that section and without the charge

that there was an agreement of the defendants to violate that section, there could be no violation of Section 371 because there would be no agreement to violate a law of the United States. Accordingly, Mr. Gibson is a "defendant indicted under Section 875".

Section 3239 specifically provides to any such defendant the absolute right to be tried in the district in which the interstate communication "was first set in motion". Thus, application of the customary requirement that venue must be alleged by the Government and proved, when applied to this case, necessarily means that the Government must allege the place in which the interstate communication "was first set in motion".

Even a casual examination of Count Five shows that it does not satisfy this statutory requirement. Instead, in paragraph 4 of Count Five the Government has alleged only that, "to effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California *and in other places.*" (Emphasis supplied) The same paragraph continues by specifying five telephone calls between defendants Palermo and Carbo and Leonard. There is no allegation with respect to any telephone call by Mr. Gibson. More significantly, there is no allegation as to either of the termini of such telephone calls. Indeed, there is not even an allegation that these telephone calls were interstate communications.

The ordinary reading of the English language requires that paragraph 4 of Count Five be construed to mean that one or more of the specified calls was initiated or completed in Los Angeles County. The form of the allegations, however, precludes any determination as to which of such calls this is true. Even more important, the phrase "and in other places" cannot properly be read as referring only to other than California, and in any event the right guaranteed by Section 3239 with respect to the place of trial of an indictment under Section 875 cannot possibly be satisfied because of the absence of allegations with respect to the place where the communications relied upon by the Government were "first set in motion".

Trying Mr. Gibson on an indictment so lacking in the requisite allegations as to the venue denied to him both the rights guaranteed by the Sixth Amendment, and in light of the explicit provisions of 18 U.S.C. § 3239, and the due process of law required by the Fifth Amendment to the Constitution of the United States.

The Government may argue that because of the provisions of 18 U.S.C. § 3237, venue may be laid in either the district where an offense is begun or where it is terminated if more than one district is involved. See *United States v. Smith,* 92 F. 2d 460 (C.A. 9th 1937). That section has no applicability here, however, because that section explicitly states its rule shall apply "except where otherwise expressly provided by an enactment of Congress . . ." Obviously,

Congress has "otherwise expressly provided" in Title 18 § 3239 quoted hereinbefore.

Similarly, the Government may argue that Section 3239 does not apply because Count Five charges a conspiracy and that venue, therefore, may be laid either in the district where the alleged illegal agreement is alleged to have been made or in a district where it is alleged one or more overt acts in furtherance of the agreement were committed. But Count Five charges violation of both Sections 371 and 875(b) of Title 18. Section 3239 applies to "*any* defendant indicted under Section 875 . . ." (emphasis supplied). Count Five demonstrates that Mr. Gibson was so indicted. Accordingly, venue should have been alleged in accordance with the requirements of Section 3239 to satisfy the requirement of criminal pleading in the courts of the United States.

B. THE INSUFFICIENCY OF THE EVIDENCE

1. As to Count I.

Count I of the indictment charges Mr. Gibson and others with conspiring to obstruct interstate commerce by means of extortion from Nesseth and Leonard of a share of the fight purses of Don Jordan and control of that fighter. But the prosecution failed to prove beyond a reasonable doubt that Mr. Gibson was a party to any such agreement. In fact, the verdict was based on innuendo, invective, outright perjury, testimony about the conduct of some of the other de-

fendants outside the presence of Mr. Gibson, not known to him prior to the trial, and references to Mr. Gibson in conversations outside his presence between some of the defendants and prosecution witnesses and others. Certainly there was no direct evidence that Mr. Gibson was part of any conspiracy, as charged or otherwise, and what there is cannot be described as circumstantial evidence because it will not support, logically, the inference that he was a party to any such agreement.

What the record does show, without contradiction, is that at all of the times material hereto Mr. Gibson was engaged in carrying out his duties as a salaried employee of the International Boxing Clubs of New York and Illinois, or the successor of the latter, the Boxing Division of the Chicago Stadium Corporation. These duties were being carried out under the direction and supervision of the responsible corporate officers and in accordance with the policies fixed and determined by those officers. At all of the times material hereto, and for some years prior thereto, these companies had been engaged in the business of promoting professional boxing matches and, subject to the authority of promoters, sponsors and networks, as well as state athletic commissions, making such boxing matches available for telecasting at the rate of more than one hundred fights per year.

In the course of carrying out these duties Mr. Gibson necessarily had telephonic and personal contact with all of the other persons engaged in the boxing

business whether they were of high or low degree. He necessarily was in communication with managers, fighters, other promoters, sports writers, state athletic commissioners and their staffs, and any other persons connected in one way or another with professional boxing. Significantly, in this regard, it stands uncontradicted that prior to this trial Mr. Gibson never knew or heard of either Joseph Sica or Louis Tom Dragna. His contacts with Mr. Carbo over a period of more than ten years were limited to a few isolated conversations unrelated to the subject matter of this cause. The payments to Mrs. Carbo, all duly recorded in corporate books and records, were made at the direction of Mr. Norris, then president of the International Boxing Clubs. Even those payments terminated prior to the events involved here and there is no evidence that these payments were either unlawful or illegal or were anything other than the exercise of business judgment as to the best way to maintain working relationships with certain fighters and managers whose skill and services were necessary to the promotion of more than one hundred boxing matches per year.

Mr. Gibson's contacts with Palermo plainly arose from, and were limited to, Palermo's long activities as a manager of many fighters, some of them champions and others outstanding in their weight classes. None of this is contradicted by any evidence tendered by the prosecution. It is striking, if not determinative, that the prosecution offered no witnesses to contradict any of this. Indeed, with respect to most of

these matters the prosecution did not even cross-examine the witnesses concerning them, e.g., witnesses Wirtz and Malitz, (R. Tr. 3902-3907, 5303).

Basically the prosecution depends upon the testimony of Jack Leonard, Don Nesseth and Jackie McCoy. Even taken as wholly true, which it was not, that testimony could not support an inference that Mr. Gibson was party to any conspiracy. Leonard testified that on or about October 23, 1958, when he, Nesseth and McCoy, were negotiating with Mr. Gibson for a championship fight for Don Jordan with Virgil Akins, he, Leonard, told Mr. Gibson that Palermo said that unless he got a part of the managers' share of the earnings of Don Jordan there would be no championship fight. Leonard further testified that Gibson said that was "ridiculous" and that it "is unreasonable. Nobody does things like that, about taking money out of your fighters."

Leonard also testified that when he said he feared violence if he did not accede to Palermo's demands, Mr. Gibson told him "that stuff went out with high button shoes", (R. Tr. 603-604). Leonard then testified that though Nesseth, the manager of record of Jordan, refused to accede to any such demands, Mr. Gibson told him, Leonard, to agree to them and he, Gibson, would straighten the matter out when he got back to Chicago. Later, Leonard testified that Mr. Gibson assured him and kept assuring him "that if there was any finances involved, any money to be involved, he would take care of it, he would pay it", (R. Tr. 618).

This testimony would hardly warrant the inference that Mr. Gibson was a party to an agreement with Palermo or any one else to take money from Leonard or Nesseth. It would indeed be a strange and weird distortion of legal principles to suggest that Mr. Gibson was a party to an agreement to extort money from himself. The real fact, of course, is that no such promise was ever made and no suggestion made by Mr. Gibson that Leonard agree to Palermo's alleged demands.

Later events relied upon by the prosecution are even more inconsistent with the charges in the indictment. Leonard sought, and Mr. Gibson arranged for, an Eighteen Hundred Dollar advance to Leonard in connection with a fight which Leonard proposed to promote in Porterville. Advances to managers, promoters, and fighters are an integral part of the method by which boxing matches are promoted and staged. For example, Mr. Gibson made an advance of Twenty-Five Hundred Dollars to Donald Nesseth about which Nesseth lied. Mr. Wirtz testified that outstanding advances by the International Boxing Clubs at any given time ranged from One Hundred Seventy-Five Thousand to Two Hundred Seventy-Five Thousand Dollars. The Porterville advance was regularly and duly made and recorded in the corporate books and records. The prosecution, however, contends that this advance to Leonard corroborates Leonard's version of the promises alleged to have been made by Mr. Gibson apparently failing to recognize that the only basis for denying the wholly corroborated character of the ad-

vance is Leonard's unsupported testimony. Thus the prosecution seeks to corroborate an admitted liar by another lie by the same liar.

It is doubtful whether the credibility of any witness was ever so badly battered as was the credibility of Jack Leonard. Much of the attack on his credibility came from the prosecution. In its opening statement the prosecution asserted that Leonard had made inconsistent statements prior to the trial (R. Tr. 350). The prosecution was right. In its closing argument the prosecution conceded that, using his wife, Leonard had attempted, after the return of this indictment, to extort Twenty-Five Thousand Dollars from Mr. Palermo not to testify in the trial. Similarly, there was uncontradicted evidence of an effort by Leonard to extort an equal amount from Joseph Sica. Every witness, including one submitted by the prosecution, who knew Leonard testified as to his generally bad reputation as to truth and veracity. In fact, the prosecution itself had so little confidence in Leonard's capacity for truth that he was not submitted as a rebuttal witness though practically every part of his testimony was contradicted over and over again by prosecution witnesses, defense witnesses and defendants.

What the evidence does show without contradiction about Mr. Gibson is that with the approval of his business associates he was responsible for the International Boxing Clubs advancing Twenty-Eight Thousand Dollars to Jack Leonard in a vain effort to set him up in business as a fight promoter. The uncontradicted evidence also shows that Leonard sought to

manipulate affairs to evade his obvious debt to the International Boxing Clubs. The evidence also stands uncontradicted that Mr. Gibson further sought to aid Leonard by arranging a loan from Mr. Tucker for Ten Thousand Dollars for Leonard, again in an effort to assist Mr. Leonard in his business. The evidence stands uncontradicted that Mr. Gibson persuaded the Hollywood Legion Post to provide collateral security for a performance bond for Jack Leonard, all in an effort to keep him in business as a fight promoter. None of these efforts succeeded.

From this vantage point one may question the business acuity of Mr. Gibson in his reliance upon Leonard. But the conduct of Mr. Gibson certainly does not warrant the inference that he was part of a conspiracy to victimize Leonard. Actually with one exception, the check to Mr. Palermo, the evidence in this record with respect to the transfer of funds shows that all of the funds flowed in only one direction, that is to Jack Leonard. It is not only the credibility of Leonard which is shattered. His admitted business relationships with Mr. Gibson make it clear that there was a motive, and a malicious one at that, for his testimonial effort to involve Mr. Gibson. Leonard took and squandered the International Boxing Clubs' funds. Time was running out on him and he chose to attack his creditors rather than to attempt to repay them.

None of the prosecution evidence is consistent with the charge against Mr. Gibson. Prosecution proof of the meeting between Leonard and Palermo in Miami, carefully concealed from Mr. Gibson, is hardly con-

sistent with the charge of conspiracy between Mr. Gibson and any of the persons involved here. Similarly, the recorded conversations, all outside the presence of Mr. Gibson, show that Leonard and Nesseth, as well as Palermo, knew Mr. Gibson was no part of any conspiracy. The May 3 telephone conversation between Leonard and Nesseth and Mr. Gibson, when they claimed that they were being threatened, dispels the last wisp of the prosecution's contentions. It was Mr. Gibson who advised Leonard and Nesseth to "run, not walk" to the nearest law enforcement officers. That, we respectfully submit completely negates any intention on the part of Mr. Gibson to extort anything from anybody. Equally significant, it does not appear that either Leonard or Nesseth was so "frightened" that either had sought the protection of the law prior to Mr. Gibson's advice.

Finally, there is no evidence of any "economic coercion" exerted on Leonard by Mr. Gibson. Actually, all of the evidence is to the contrary.

We recognize that there has been a verdict of guilty returned as to Mr. Gibson and that this Court is limited in its review of the evidence, but we respectfully call to the Court's attention the observations of the late Mr. Justice Jackson with respect to the trial of a conspiracy case. He said in *Krulewitch v. United States,* 336 U.S. 440, 453-454 (1949):

* * * *

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie

> the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. Blumenthal v. United States, 332 U.S. 535, 559, 68 S. Ct. 248, 257, all practicing lawyers know to be unmitigated fiction. See Skidmore v. Baltimore & Ohio R. Co., 2 Cir., 167 F. 2d 54.
>
> The trial of a conspiracy charge doubtless imposes a heavy burden on the prosecution, but it is an especially difficult situation for the defendant.
>
> * * * *
>
> A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. * * *''

Mr. Justice Jackson might well have been speaking of this very case. But it is fundamental that a charge of conspiracy cannot be sustained unless it is proved beyond a reasonable doubt that there was an agree-

ment by the particular defendants to commit the specified offense against the United States. *Ingram v. United States,* 360 U.S. 672, 677-678 (1959); *Pereira v. United States,* 347 U.S. 1, 12 (1953); *Krulewitch v. United States,* 336 U.S. 440, 443-444, 452-458 (1949); *Direct Sales Co. v. United States,* 319 U.S. 703, 711 (1943).

To demonstrate a conspiracy to commit a particular substantive offense the prosecution must prove beyond a reasonable doubt at least the extent of criminal intent which would have to have been shown to demonstrate the commission of the substantive offense itself. *Ingram v. United States,* supra.

Even if the prosecution proved beyond a reasonable doubt knowledge on the part of a defendant of wrongdoing by others or an agreement between others to commit an offense, that would not be sufficient to convict that defendant as a party to any such agreement. *Ingram v. United States,* supra; *Krulewitch v. United States,* supra; *Goodman v. United States,* 128 F. 2d 854 (C.A. 9th 1942); *United States v. Falcone,* 109 F. 2d 579 (C.A. 2d 1940); *Muyres v. United States,* 89 F. 2d 784 (C.A. 9th 1937).

In the instant case we respectfully submit that the evidence as to Mr. Gibson falls far short of satisfying these well established minimums to sustain a conviction for conspiracy. Accordingly we urge this Court to reverse his conviction.

2. As to Count V.

Count V charges Mr. Gibson and others with conspiring to transmit in interstate commerce communications, threats to injure Leonard and Nesseth with intent to extort a share of the management of Don Jordan. There is no evidence of any agreement on the part of Mr. Gibson with any one to transmit threats in interstate commerce or otherwise. On the contrary, even the evidence of the prosecution shows clearly Gibson's marked and instantaneous negative reaction to suggestions of violence and his advice to seek the aid of law enforcement officers. Ironically, all of the evidence with respect to interstate communication so far as Mr. Gibson is concerned shows on his part a vigorous and determined effort to use the facilities of interstate communications, telephonic and otherwise, to further his business of promoting and telecasting boxing matches. At no point in the record is there the slightest suggestion of any intent on the part of Mr. Gibson to threaten any one with physical violence or economic pressure or any thing else. Thus as to Count V there is no evidence upon which the conviction could be sustained.

C. DENIAL OF FAIR TRIAL

1. Form of the Indictment.

The vagueness and indefiniteness of Counts I and V of the indictment have been discussed hereinbefore. That argument will not be repeated here. Since Counts I and V of the indictment were insufficient

and indefinite to apprise the defendant of the charges brought against him so as to enable him to prepare a defense, it necessarily follows that the defendant could not have been afforded a fair trial.

In addition, both Counts I and V contain the following allegations:

> "It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands."

As has already been pointed out hereinbefore it stands uncontradicted in the record that Mr. Gibson never knew or heard of Joseph Sica and Louis Tom Dragna prior to the return of this indictment. Thus, there was a fatal variance in proof on the trial. Equally important, the allegations as to "underworld reputations" are so vague and indefinite and so prejudicial to Mr. Gibson that to compel him to go to trial on such an indictment, to permit the indictment to be read to the jury as it was done, and to permit the jury to have a copy of the indictment during its deliberations, as was done, was to prejudice Mr. Gibson and to deny a fair trial to him.

Vague generalities as to reputation as the basis of criminal prosecution have always been condemned by

the courts. See *Lanzetta v. U. S.*, 306 U.S. 451 (1939). In this case the prejudice to Mr. Gibson was compounded by the Court's allowing the prosecution, over objections to cross-examine Mr. Gibson about "the underworld" without defining the term. Indeed, the prosecution refused to obey a direct charge by the Court to define the term. This Court's attention to this whole colloquy is invited. It is set forth in the Appendix hereto. We respectfully submit that this alone would be sufficient to demonstrate that Mr. Gibson was denied a fair trial.

2. Misjoinder.

In this case Mr. Gibson was joined as party defendant not only with the other defendants accused of conspiracy in Counts I and V but also with defendants who were accused of substantive offenses in eight other Counts alleged to have been committed in connection with the same matters which were the subject of the conspiracy indictment. It must be conceded that the joinder of the defendant and charges is a matter of judicial discretion. Under the circumstances in this case, however, the joinder of Mr. Gibson with the other defendants was so prejudicial as to amount to an abuse of judicial discretion and a denial to Mr. Gibson of a fair trial. As a matter of fact the evils so classically described by Mr. Justice Jackson in *Krulewitch v. United States,* 336 U.S. 440, 443-445, quoted hereinbefore, were accentuated in this case by reason of this misjoinder. In this connection the court's attention is respectfully directed to *Schaeffer v. United States,* 362 U.S. 511, 516, 1960. A fair trial,

we submit, was impossible for Mr. Gibson after motion for severance was denied.

3. Conduct of the Prosecution.

The zeal of advocacy has long been a characteristic of Anglo-American litigation. Far from being an object of condemnation it may well be a mark of professional competence. This is true whether the advocate represents the prosecution or the defense. There are, however, well-recognized, if not specifically defined, limits beyond which the most zealous advocate should not proceed. In this case, we respectfully submit, the prosecution exceeded allowable bounds.

To begin with, prior to the trial, representatives of the prosecution took a statement of several hundred pages from Mr. Gibson with the promise that this statement would be considered in determining whether to proceed with the indictment against him. The taking of that statement, which took place over five or six days was concluded in June, 1960. A few days later the prosecution moved for a long continuance of the matter but failed to serve a copy of the notice of motion on counsel for Mr. Gibson. Instead a copy was served on Mr. Gibson himself by mail and then by long distance telephone one of the prosecutors informed Mr. Gibson that he need not be concerned about the motion for continuance because, on the basis of his statement, the matter would be dismissed as to him.

About a month later a representative of the prosecution assured counsel for the defendant, informally,

that the prosecution would not proceed against Mr. Gibson. Despite repeated inquiries by counsel for the defense between June and late November, 1960, no final answer as to the prosecution's decision with respect to the matter could be secured. When formal inquiry was made of the Department of Justice in Washington concerning the matter early in January, 1961, prior assertions by representatives of the prosecution were repudiated.

A motion to dismiss based on these matters was filed to bring the matter to the attention of the Court immediately prior to the trial (Tr. 461). The prosecution filed affidavits admitting some of the allegations made by the defense but denying others (Tr. 446). When the defense offered to produce witnesses in support of the motion the trial judge first agreed to hear them. Later on the same day when the witnesses had been subpoenaed, the trial judge refused to hear them and denied the motion to dismiss but gave leave to the defense to renew the matter at an appropriate time, perhaps on motion for judgment of acquittal.

Following the verdict that motion to dismiss was incorporated as a part of the post-trial motion for judgment of acquittal (Tr. 973). As before, the prosecution filed affidavits concerning the matter (Tr. 1208 and 1211), and this time charged defense counsel with misconduct. Defense counsel were directed by the successor judge to file a response (R. Tr. 7983). This was done under oath at the end of July, 1961 (Tr. 1220). The prosecution filed additional affidavits shortly thereafter (Tr. 1300). The successor judge

took no action on the matter until after he had entered final judgment and sentence on December 2, 1961. Then he found that defense counsel were guilty of no misconduct and decided that the matter was moot.

We concede the right, and indeed the duty, of the prosecution to proceed with an indictment. We respectfully submit, however, that the prosecution had no right to mislead Mr. Gibson as to its intentions. Certainly the prosecution had the power to dismiss the indictment as to him if it elected to do so. See Rule 48, Federal Rules of Criminal Procedure. Equally certain the long delay and the reliance of Mr. Gibson on the assertions by the prosecution sorely hampered preparation of his defense and deprived him of a speedy trial. Most damaging to Mr. Gibson was the refusal of the trial Court to hear and determine the issue.

We have already called the Court's attention to the colloquy concerning the "underworld". This is an example of the type of examination which the Court permitted the prosecution to engage in despite objections of defense counsel. Equally serious, on closing argument, the trial judge emphatically forbade defense counsel to interrupt the prosecution even for the purpose of making objections (R. Tr. 6825-6826). Reasonable limitations of space will not permit detailed analysis of the extent to which the prosecution on closing argument distorted the evidence in a fashion which inevitably misled the jury. Finally, on its rebuttal argument, the prosecution raised and devoted a great

deal of time to two matters of argument which had not been referred to by the prosecution on its opening, though that had consumed more than seven hours, or by any defense counsel in argument. Defense counsel sought leave of Court to reply to these matters. That leave was denied (R. Tr. 7588-7589).

All of this conduct of the prosecution contributed to the denial of a fair trial to Mr. Gibson. See: *Berger v. United States,* 295 U.S. 78, 88 (1935); *Marks v. United States,* 260 F. 2d 377, 383 (C.A. 10th 1958); *Ross v. United States,* 180 F. 2d 160 (C.A. 6th 1960); *Pierce v. United States,* 86 F. 2d 949, 952 (C.A. 6th 1936).

4. Conduct of the Trial.

We respectfully submit that the conduct of the trial resulted in denial of a fair trial to Mr. Gibson in many respects. Among these were the method of selection of the jury, rulings on admissibility of evidence, the action of the court with respect to instructions, and the failure of the court to determine whether the prosecution had proved beyond a reasonable doubt that the conduct of Mr. Gibson complained of had any effect on interstate commerce.

(a) Selection of the Jury.

On behalf of Mr. Gibson a motion to quash the venire was made on the ground that he is a Negro and that there was a systematic exclusion of Negroes from the jury (R. Tr. 75). That motion was summarily overruled on the basis of what the trial judge

said he knew the facts to be and defense counsel was denied even an opportunity to make an effort of proof with respect to the matter. Instead the court itself called two witnesses to testify with respect to the method used to secure the venire (R. Tr. 90-96). Later (R. Tr. 4342-4346), the judge made a further statement as to his observations concerning service by Negroes on juries.

Discrimination against a race by barring or limiting citizens of that race from participation of jury service has long been onerous to American thought and the Constitution and laws of the United States, Title 18 U.S.C., § 243; *Cassell v. State of Texas,* 339 U.S. 282 (1950), and cases there cited. It was error to deny the offer of proof of systematic exclusion of Negroes from the venire. *Carter v. Texas,* 177 U.S. 442 (1900); *Goldsby v. Harpole,* 263 F. 2d 71 (C.A. 5th, 1959). The efforts by the judge himself to answer the motion to quash the venire were themselves improper. *Norris v. Alabama,* 294 U.S. 587, 588 (1935).

Actually what the efforts of the trial judge resulted in showing was that the methods used to select the panel were not in accordance with the requirements of the applicable statutory provisions, 28 U.S.C., § 1864. It is clear that the selection of names for the jury box is for the jury commissioner and the clerk of the court. It is equally clear that in the Southern District of California this practice is not followed.

The procedure used to select the jury from the panel also violated the applicable Rules. Rule 24 of

the Federal Rules of Criminal Procedure specifically provides that the defendants are jointly entitled to ten peremptory challenges and if there is more than one defendant the court may allow additional peremptory challenges. In this case the court allowed the defendants seventeen peremptories to be exercised jointly. The court allowed the prosecution ten peremptories. The court then required that the prosecution list its peremptories on a tally sheet provided and required that the defense do likewise without either side knowing what peremptory challenges had been made by the other. These two tally sheets were handed to the clerk who read off the first twelve names of jurors in the order of assignment of numbers not objected to by either side.

Three alternate jurors were chosen in the same fashion except that each side was allowed only one peremptory as to the alternates. This, despite the express provision of Rule 24(c) that each side is entitled to two peremptory challenges if two or three alternate jurors are to be impanelled.

We respectfully submit that this method does violence to the intendment of the Rules with respect to peremptory challenges. We suggest that the method followed does not assure the minimum number of peremptory challenges provided by the Rules.

For all of the foregoing reasons we respectfully submit that Mr. Gibson was denied the right of trial by jury required by the Seventh Amendment to the Constitution of the United States.

(b) Rulings on the Admissibility of Evidence.

At the outset of the trial the court instructed counsel that it would rather entertain a motion to strike at the close of the government's case than to pass on objections with respect to evidence offered as the trial proceeded (R. Tr. 412-413). Thereafter it is clear from the record that though from time to time objections were made on behalf of Mr. Gibson with respect to the relevancy of testimony or other evidence offered by the prosecution, the court did not consider the questions as to relevancy to this individual defendant. At the close of the prosecution's case a detailed motion to strike was filed on behalf of Mr. Gibson (Tr. 766). That motion was summarily denied despite the fact that the prosecution had not shown that Mr. Gibson was a party to the conspiracy charged. Indeed, it is doubtful that the court even considered the question seriously. By that time there had been admitted into evidence over the objections of counsel for Mr. Gibson testimony with respect to conversations outside his presence, conduct of other defendants not before known to him, and even testimony of conversations between persons not parties to the suit, particularly a recording of a conversation between one William Daly alleged to be a co-conspirator and not indicted, and Jack Leonard. There never was any evidence presented to show that Daly was a co-conspirator.

There was evidence, however, that Leonard, wired for sound by the Los Angeles Police Department, had gone to a hotel room occupied by Daly and proceeded to make a conversation with him. This the prosecu-

tion relied upon to corroborate Leonard's testimony in part. As a result there was the ridiculous and prejudicial situation that out-of-court statements by a prosecution witness, not made in the presence of Mr. Gibson, but in which he was mentioned, were admitted into evidence to corroborate the testimony of a prosecution witness who not only was available but who in fact testified at great length.

Similarly, recordings obtained by wire-tapping and other recordings of conversations outside the presence of Mr. Gibson, but in which he was mentioned, were admitted into evidence over his objection. The prejudice and harm to Mr. Gibson of admitting such evidence is demonstrated by the fact that after it retired, the jury, from this enormous record, asked for no reading of testimony and for no exhibits but the three recordings.

We adopt the argument of other defense counsel with respect to the impropriety of the admission of these recordings. We respectfully urge upon this Court, however, that the method used by the trial court in ruling on the admissibility of evidence in this case where both conspiracy and substantive counts were at issue was particularly erroneous and prejudicial to Mr. Gibson and, if no other reason were present, would require the reversal of his conviction.

(c) The Instructions.

We respectfully submit that in several particulars the action of the court with respect to instructions was so erroneous as to deny to Mr. Gibson a fair trial.

Though requested so to do the court did not apprise counsel of the instructions to be given prior to final argument. This, despite the explicit requirement of Rule 30 of the Federal Rules of Criminal Procedure. See *Ross v. United States,* 180 F. 2d 160 (C.A. 6th, 1950). This failure on the part of the court substantially prejudiced Mr. Gibson. See *Ross v. United States,* supra, and *United States v. Crescent-Kelvan Co.,* 164 F. 2d 582, 589 (C.A. 3rd 1948).

With respect to the instructions actually given or refused the court's action was equally prejudicial to Mr. Gibson. On his behalf, and it was not contradicted, substantial evidence was adduced as to his good character and excellent reputation for truth and veracity. It is clear that he was entitled to an instruction as to the effect of such evidence. Such an instruction was requested, Defendant Gibson's Instruction F which is set forth verbatim in the Appendix hereto. The trial judge indicated that he would give that instruction. Instead, he made a series of statements with respect to this matter which are also set forth verbatim in the Appendix hereto.

We respectfully submit that those remarks would not satisfy the requirements with respect to an instruction as to character evidence. The statements made by trial judge completely omitted informing the jury that "an established reputation for good character alone may create a reasonable doubt as to the defendant Gibson". This aspect of the matter is not only of prime importance but has long been recognized as the minimum to which a defendant of good

character is entitled. See 4 Barron, Federal Practice & Procedure, 246 and *Johnson v. United States,* 269 F. 2d 72, 74-75 (C.A. 10th 1959). We respectfully submit that in a case such as this where the credibility of the principal prosecution witness is attacked and where a defendant takes the stand and testifies at considerable length, and is subjected to long arduous cross-examination as was Mr. Gibson and where evidence of good character is uncontradicted, to deny to him an instruction fairly and correctly apprising the jury of the effect of such character evidence is to prejudice and harm Mr. Gibson to such an extent that the conviction should be set aside.

Defense counsel contended that the prosecution had offered evidence, particularly testimony of Jack Leonard, which the prosecution knew was false and misleading in material parts. It is well settled that if the prosecution so acts a conviction even based in part on such testimony cannot stand. See *Napue v. State of Illinois,* 360 U.S. 264 (1959), and cases there cited. At first when requested so to do the trial judge indicated that he would give such an instruction (R. Tr. 7434). Actually he refused so to do. Under these circumstances we respectfully submit Mr. Gibson was denied, to his prejudice, an instruction to which he had a right.

Similarly the instructions given with respect to the law of conspiracy did not conform to the requirements of the decisions of the Supreme Court of the United States. See *Ingram v. United States,* supra, and *Direct Sales v. United States,* supra. We adopt the

argument of other defense counsel as to the insufficiency and erroneous character of the instructions given on the law of conspiracy.

Similarly, not as part of the instructions, but after the jury had retired and when it returned to listen, at its own request, to the playing of one of the disputed recordings, the court made the following statement:

* * * *

> "However, before you start in the jury should be cautioned that Mr. Daly is not a defendant here. The consideration by you of the Daly-Leonard conversation is only appropriate if you find from the evidence, using the standards that the court has previously told you, that Daly was either a conspirator, although he escaped indictment, or that he was an agent, that is, that he was one who was acting for one of the conspirators, if there were conspirators. It is for you to decide if there was a conspiracy." (R. Tr. 7789.)

There was no opportunity for counsel to object to this statement and indeed if any objection had been made it would have unduly emphasized the statement.

It will be observed that the statement contains no definition of the term "agent", and it ignores the fact that the indictment charged that Daly was a co-conspirator, though not indicted. This statement by the court was enormously prejudicial so far as Mr. Gibson is concerned in view of the fact that he had testified that Daly had participated with him and others in the discussions leading to the formation of the Hollywood Boxing and Wrestling Club and that,

because of Daly's close business and personal connections with Mr. Underwood of the Hollywood Legion Post, he, Mr. Gibson, had requested Mr. Daly to go to Los Angeles to help in solving the desperate business problems of the Hollywood Boxing and Wrestling Club in May, 1961.

We respectfully submit that this final action by the trial judge culminated the long series of deviations from accepted and standard practices in the United States district courts which characterized the trial of this case. Taken all together we respectfully submit they resulted in denial of a fair trial to Mr. Gibson.

(d) The failure of the Court to Find That Interstate Commerce Was Affected.

It has been uniformly held that in a prosecution under Title 18, § 1951, U.S.C., the court, and not the jury, must determine whether the prosecution has adduced evidence to demonstrate that the defendant's activities complained of affect interstate commerce so as to sustain federal jurisdiction, *United States v. Green,* 246 F. 2d 155 (C.A. 7th 1957); *United States v. Lowe,* 234 F. 2d 919 (C.A. 3rd 1956); and *Hulahan v. United States,* 214 F. 2d 441 (C.A. 6th 1954).

In this case the court never made any such finding. Instead the jury was told (R. Tr. 7659):

> "If boxing matches are, in fact, televised and television is sent into other states, that brings it within the ambit of interstate commerce."

We respectfully submit that this is not the law as has been shown hereinbefore in discussion of the fail-

ure in the indictment to allege matters showing an effect on interstate commerce.

5. The Effect of Action by a Successor Judge.

The late Honorable Ernest A. Tolin conducted all of the proceedings in this cause until the time of his death on or about June 11, 1961. At that time the verdict had been returned and post-trial motions for new trial and judgment of acquittal had been filed.

Thereafter Mr. Gibson, and other defendants, filed a supplemental motion for new trial on the ground that a successor judge could not provide substantial justice and due process of law in passing on the pending motions (Tr. 988). Those motions were all denied by the successor judge, the Honorable George H. Boldt, on October 16, 1961, (Tr. 1342). Rule 25 of the Federal Rules of Criminal Procedure provides for a successor judge, but "if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason he may in his discretion grant a new trial". The determination by a successor judge that he can perform the duties required after a verdict is reviewable on appeal, *Connelly v. United States,* 249 F. 2d 576 (C.A. 6th 1957). We respectfully submit that the determination by Judge Boldt in this case was an abuse of sound judicial discretion because of the fact and circumstances of this trial particularly with respect to Mr. Gibson.

The trial in this case began on February 21, 1961, and there were hearings before the Court on more than sixty days prior to the verdicts. The Reporter's

Transcript of Proceedings in this cause totals more than seventy-five hundred pages. In the course of the trial approximately ninety witnesses testified. Thirty-seven of these were offered by the prosecution on its direct case. More than thirty witnesses, including this defendant and three of the other defendants, testified for the defense. More than twenty witnesses were tendered by the prosecution in rebuttal. Approximately three hundred fifteen exhibits were marked and about three hundred of these were received in evidence.

Included among the exhibits admitted were a number of recordings of conversations alleged to have been had between various persons by telephone and otherwise. Mr. Gibson did not participate in any of these conversations. All of the recordings introduced by the prosecution were admitted over his objections. Six of these recordings were played in open court before the judge and jury. Three recordings offered by the prosecution including one not previously played were played for the jury in open court after it had retired to consider its verdicts. The playing of these recordings and the attendant proceedings both in and out of the presence of the jury took up at least twenty per cent of the time devoted to the trial. The Reporter's Transcript of Proceedings, however, contains no transcript of any of these recordings because it was the opinion of the trial judge that the reporter could not fairly transcribe from the reproduction of these recordings in the courtroom. Though what purported to be transcripts of some of the recordings were marked as exhibits, Judge Tolin refused to admit these pur-

ported transcripts in evidence in the absence of agreement by all counsel that such transcripts were correct. There was no such agreement.

No judgment had been entered in this cause by Judge Tolin prior to his death. Even more important, the post-verdict motions were pending. Those motions raised substantial and complex questions of both law and fact. Mr. Gibson contended then and does now that the evidence is not sufficient to support the verdicts as to him. There is a sharp conflict in the evidence in this cause with respect to Counts I and V of the indictment which are the only counts charging Mr. Gibson. Over repeated objections, prosecution evidence was admitted which had no application to Mr. Gibson and which was prejudicial and harmful to him. There is a substantial question as to the credibility of the principal witness for the prosecution, Leonard Blakely, alias Jack Leonard, and some of the matters derogatory to the credibility of this witness and another prosecution witness, Don Nesseth, were conceded and admitted by the prosecution. Even more important is the credibility of Mr. Gibson as a witness in light of the nature of the charges against him, the length and nature of his direct testimony and the cross-examination of him, and the uncontradicted evidence of his good character. It is respectfully submitted that one who has not observed the witnesses could not fairly resolve these issues.

The pending motions raised other issues which it is respectfully urged could not be fairly resolved by one who did not have the "feel of the case." These range

from the sufficiency of the indictment, the question of venue and the propriety of a joint trial through, but not limited to, the legality of the method of jury selection, the propriety of innumerable rulings on the admissibility of evidence, the propriety of the conduct of the prosecution before and during the trial and particularly in closing argument, on to the sufficiency of the instructions given and refused.

More delicate and more difficult to state is a question which arises from the medical history of Judge Tolin. His untimely demise immediately following a long and arduous trial and his long history of serious cardiac difficulties with the inevitable attending necessity for medication and restricted activities suggests that though he was an able and experienced judge, in the conduct of this trial he may have been unable to proceed with the required fairness and impartiality. Review of his conduct of this trial under these circumstances by a successor judge, it is respectfully submitted, is not likely to serve the interests of justice when "manifestly, the judge to whom such a proceeding is assigned because of the death of the trial judge, finds himself in a position of considerable delicacy, as he has to perform the somewhat invidious function of reviewing the rulings of a judge of co-ordinate jurisdiction. * * *." (*Miller v. Pennsylvania Railroad Co.*, 161 F. Supp. 633, 636 (D.C.D.C. 1960).

Where there is a substantial conflict in the evidence and the credibility of prosecution witnesses is a serious issue a successor judge cannot provide a fair trial to a defendant in passing on post-verdict motions and

in rendering sentence. *Connelly v. United States,* 249 F. 2d 576, 580-581 (C.A. 8th, 1957); *Brennan v. Crisco,* 198 F. 2d 532, 533 (C.A.D.C., 1952); *Federal Deposit Ins. Corp. v. Siraco,* 174 F. 2d 360, 363-4 (C.A. 2d, 1949); *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.,* 175 F. 2d 77, 80 (C.A. 2d, 1949); *Smith v. Dental Products Co.,* 168 F. 2d 516, 519 (C.A. 7th, 1948); *In re Linahan,* 138 F. 2d 650, 653-4 (C.A. 2d, 1943); 7 Moore Federal Practice (2d Ed. 1955) 1458.

Under all these circumstances we respectfully urge this Court to set aside the ruling of Judge Boldt and the conviction of Mr. Gibson.

CONCLUSION

The whole record in this case requires a reversal with dismissal as to Mr. Gibson with respect to both Counts I and V.

Dated, July 18, 1962.

Respectfully submitted,

LOREN MILLER

WILLIAM R. MING, JR.

Attorneys for Appellant Gibson.

CERTIFICATE AS TO COMPLIANCE WITH RULES 18 AND 19 OF THE RULES OF THIS COURT.

Counsel for appellant hereby certify that they have examined the provisions of Rules 18 and 19 of this Court and in their opinion the tendered brief conforms to all requirements.

Dated, July 18, 1962.

LOREN MILLER
WILLIAM R. MING, JR.
Attorneys for Appellant Gibson.

(Appendix Follows)

Appendix.

Appendix

COUNT ONE

(U.S.C., Title 18, Sec. 1951)

1. Prior to October 22, 1958, the exact date being unknown to the grand jury, and continuing to the date of this indictment, defendants Paul John Carbo, aka Frankie Carbo, Frank Palermo, aka Blinky Palermo, Joseph Sica, Louis Tom Dragna, Truman Gibson, Jr., unindicted co-conspirator William Daly, and divers other persons to your grand jury unknown, did agree, confederate and conspire to commit offenses against the United States as follows:

2. Willfully to obstruct, delay and affect interstate commerce by means of extortion, in violation of United States Code, Title 18, Section 1951.

3. The objects of such conspiracy were to be accomplished as follows:

a. The defendants Paul John Carbo and Frank Palermo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely, aka Jackie Leonard, were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and to obtain control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of the victims Donald Paul Nesseth and Leonard Blakely without paying any consideration for the monies and control so received.

c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence; and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreements to the conspirators' said demands.

d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and an influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan.

4. To effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California, and in other places, as follows:

a. On or about October 23, 1958, defendant Frank Palermo had a conversation by telephone with Leonard Blakely.

b. On or about October 24, 1958, defendant Truman Gibson, Jr., had a conversation with Leonard Blakely, Donald Paul Nesseth and Jackie McCoy.

c. On or about December 30, 1958, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

d. On or about January 5, 1959, defendant Frank Palermo had a conversation with Leonard Blakely.

e. On or about January 5, 1959, defendant Paul John Carbo had a conversation with Leonard Blakely.

f. On or about January 27, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

g. On or about January 27, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

h. On or about April 22, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

i. On or about April 25, 1959, defendant Frank Palermo had a conversation with Donald Paul Nesseth in St. Louis, Missouri.

j. On or about April 25, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

k. On or about April 25, 1959, defendant Frank Palermo had a conversation with Sam Muchnick in St. Louis, Missouri.

l. On or about April 28, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

m. On or about April 28, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

n. On or about May 3, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

o. On or about May 4, 1959, defendant Joseph Sica had a telephone conversation with Leonard Blakely.

p. On or about May 5, 1959, defendants Frank Palermo and Louis Tom Dragna visited the Hollywood American Legion Stadium where Donald Paul Nesseth and Leonard Blakely were present.

q. On or about May 6, 1959, defendants Joseph Sica and Frank Palermo had a conversation with Leonard Blakely, Donald Paul Nesseth and Jackie McCoy.

r. On or about May 6, 1959, Joseph Sica had a telephone conversation with Manuel Dros.

s. On or about May 7, 1959, defendant Truman Gibson, Jr., had a telephone conversation with Leonard Blakely.

t. On or about May 11, 1959, defendant Truman Gibson, Jr., had a telephone conversation with Leonard Blakely.

u. On or about May 14, 1959, co-conspirator William Daly had a conversation with Leonard Blakely.

COUNT FIVE

(U.S.C., Title 18, Sec. 371, 875(b))

1. Prior to October 22, 1958, the exact date being unknown to the grand jury, and continuing to the date of this indictment, defendants Paul John Carbo aka Frankie Carbo, Frank Palermo, aka Blinky Palermo, Joseph Sica, Louis Tom Dragna, Truman Gibson, Jr., unindicted co-conspirator William Daly, and divers other persons to your grand jury unknown, did agree, confederate and conspire to commit offenses against the United States as follows:

2. Willfully and with intent to extort money and a thing of value, to wit, a share of the management of the prize fighter Don Jordan, from Leonard Blakely and Donald Paul Nesseth, to transmit in interstate commerce communications containing threats to injure the persons of Donald Paul Nesseth and Leonard Blakely in violation of Title 18, United States Code, Sections 371 and 875(b).

3. The objects of said conspiracy were to be accomplished as follows:

a. The defendants Paul John Carbo and Frank Palermo were to transmit interstate telephone communications containing threats of physical harm and violence and threats of economic loss and injury to victims Donald Paul Nesseth

and Leonard Blakely, aka Jackie Leonard, in an effort to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, to wit, Donald Jordan, and control of the professional activities of the same Don Jordan by naming the opponents whom he would fight and also the places where and conditions under which he would engage in such boxing matches.

b. The defendants Paul John Carbo and Frank Palermo intended to obtain said monies and control by and with the consent of victims Donald Paul Nesseth and Leonard Blakely without payment of consideration for the monies and control so received.

c. It was a further part of said conspiracy that defendants would enlist the services of persons known to the said victims to have underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence and, for that purpose did enlist Joseph Sica and Louis Tom Dragna who were to personally contact Leonard Blakely and Donald Paul Nesseth and obtain their agreement to the conspirators' said demands.

d. It was an essential part of the conspiracy that defendant Truman Gibson, Jr., who was an officer of the International Boxing Club, Inc., and the National Boxing Enterprises, Inc., a major promoter of nationally televised prize fights, and

and influential figure in other business associations, would use his power and authority to persuade victims Donald Paul Nesseth and Leonard Blakely to accede to the demands of the conspirators for control of the prize fighter Don Jordan.

4. To effect the objects of said conspiracy the defendants committed divers overt acts in Los Angeles County, California, within the Central Division of the Southern District of California and in other places, among which are the following:

a. On or about January 27, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

b. On or about January 27, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

c. On or about April 28, 1959, defendant Paul John Carbo had a telephone conversation with Leonard Blakely.

d. On or about April 28, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

e. On or about April 29, 1959, defendant Frank Palermo had a telephone conversation with Leonard Blakely.

EXCERPT, REPORTER'S TRANSCRIPT OF RECORD
VOLUME 34, PAGES 5023-5050

Q. Mr. Gibson, did you participate in policy decisions of the International Boxing Club during the period you were a principal of that corporation?

A. I was never a principal in the corporation, Mr. Goldstein. I never owned any stock. I did participate in policy decisions while I was an officer.

Q. All right. Was it the policy of the International Boxing Club, during the time you were an officer, to use the underworld to the extent that you could in the operation of your business?

Mr. Ming. Well now, your Honor, I suggest that some weeks ago at the beginning of this trial somebody asked a question which you described as a foul question.

I should like to adopt your language. I should like to remind the court, in support of my objection, that there has been for several hundred years in the Anglo-American courts a rule that when on cross examination there is a suggestion of facts not in evidence, that it is incumbent upon the counsel who makes the assertion to adduce proof of the matter which he has referred to in his cross examination.

I will ask the court to sustain the objection which I am making and to ask the jury to ignore the question.

The Court. I do not adopt all of Mr. Ming's remarks. I do think the question was not a proper question.

Mr. Goldstein. Your Honor,——

The Court. You are only going to get one type of answer from a question of that type, and it leaves before the jury just the assertion of the prosecutor.

Mr. Goldstein. Your Honor, I have a foundation for asking that question. I ask it in good faith. If I can proceed I will show to your Honor——

The Court. You had better come to the side bar and tell me what your foundation is.

(Whereupon, from 11:50 o'clock a.m. to 12:03 o'clock p.m., the following proceedings were had at the bench, out of the hearing of the jury, with all counsel and defendants present:)

The Court. Defendants are now at the side bar with counsel.

You may proceed.

Mr. Goldstein. Your Honor please, the following questions and answers were asked of the defendant Gibson before the Kefauver Committee:

"Q. And was that policy that you finally decided on to cooperate with these underworld elements?

"A. No, not to cooperate, but to live with them.

"Q. Live with them?

"A. Yes.

"Q. Use them?

"A. To the extent that we could, but not be used by them."

Further testimony:

"Q. In order to satisfy the sponsors——"

Well, before that:

"Q. Utilize them in order to supply fighters for your matches?

"A. No, it was normally negative. We never, except in a few cases—in the case of a few championships that Mr. Norris would know more about than I. What we wanted to do was to maintain a free flow of fighters without interference, without strikes, without sudden illnesses, without sudden postponements."

Further on, the question is asked:

"Q. In order to satisfy the sponsors and have a free flow of fighters you decided to live with Carbo, is that right?

"A. We decided to live with Carbo, with the Managers Guild and with all the elements that were facts of life that we had to contend with.

"Q. But the most powerful elements were the underworld elements, were they not?

"A. I would not say that, no. I would say it was a factor to be considered.

"Q. And it was an important factor, was it not?

"A. An important factor, yes."

Further on, the question is asked:

"Q. Mr. Gibson, you indicated that the International Boxing Club recognized the existence of this underworld influence. You found out you had to live with it, is that right? I believe those were your words, those were the facts of life?

"A. Yes.

"Q. And you had to live with it?

"A. Yes.

"Q. Could you explain to us what you meant 'you had to live with it'? What did you have to do in order to go on living with it? Did you have to offer them any compensation, any type of arrangement?"

And there was an interruption and they recessed for lunch.

After the luncheon recess the Committee asked about the Carbo checks and the Palermo checks and other matters.

But I submit that the witness' testimony to the effect that they used the underworld to the extent they could, but not be used by them, is ample foundation for the question I asked. I submit that it goes directly to the question of intent, to the very facts of this case, where Sica and Dragna were brought on to the scene here by the defendants and where the testimony is that these people had reputations of being members of the underworld.

Mr. Strong. Your Honor please, first of all, what Mr. Goldstein is doing is that he is trying his case, not against the defendants who have to be tried in a proceeding of this type—they are on trial—but against general terms. He starts off with a concept of the underworld.

Now, as far as I am concerned, there is absolutely no evidence here which indicates what is meant by

"the underworld". Who is included in "the underworld"?

During the Civil War we used to have an underground railroad. Maybe some people think the underworld runs through on the underground railroad.

He is trying to create guilt here by associating general terms with persons on trial. The only way he has gotten reputation in this case is through the mouth of a man like Leonard who said he heard—and even with him it is hearsay—he said he heard something to the effect these people were part of the underworld, or words to that effect.

Whether Mr. Gibson did or did not testify that way before the Senate Committee is wholly immaterial. It can't be used as facts here. There is too nebulous a context. There is no tying in with the defendants. And to put that before the jury is highly prejudicial and wholly improper and deprives my client of a fair trial and due process of law.

The Court. It does tend to impeach the witness Gibson, does it not?

Mr. Ming. I suggest not, your Honor. What he is doing, in addition to all the things Mr. Strong has described, is endeavoring to raise irrelevancies under the guise of impeachment. There has been no testimony here by this witness as to which that is relevant.

Moreover, the question to which I objected has exactly the vice in it we pointed out. If you were to read, if you were to read, in addition to the portions Mr. Goldstein read, because he skipped around, it

would be perfectly clear that this colloquy between the two Senators who were present, and Mr. Bonomi and Mr. Gibson, was wholly outside the range of any rules of evidence that would be applicable in the United States District Court in the trial of a federal criminal case.

With those limitations not present, now to introduce this kind of material is, I suggest, your Honor, highly prejudicial to the defendant Gibson. It has nothing to do with impeaching.

Mr. Strong. May I add, your Honor, that I don't think you can create an issue for a jury to rule upon, even with relation to credibility of a witness, by asking him on cross examination some general questions about the underworld and then bringing in evidence to show he may have said something different or the same previously.

I think that is wholly improper. In the first place, it has no business here and to drag it out this way, to give the jury the opinion that what is being tried here is a case involving the underworld and, therefore, they should convict because of the general frightening terms and nebulous concept, but we are trying a case here against five individuals. I think this is highly improper and wholly deprives our clients, at least my client, of any due process.

If he could use it for impeaching purposes—There are some things that a court should keep out if they are so damaging, if they can't be separated from their proper and improper use, if a thing like that has an improper use, which is the use Mr. Goldstein

is using it for, and it should be kept out, even if by some possibility there is some relevance——

Mr. Ming. Let him point out what he is trying to impeach. I have been directed to do that at times. Let him point it out.

Mr. Bradley. I join in all the objection.

Mr. Parsons. Yes, I do too, on behalf of defendant Sica.

The Court. What are you seeking to impeach?

Mr. Goldstein. This is a direct element of the case. It goes directly——

The Court. But has Gibson testified on it?

Mr. Goldstein. He certainly has. He has testified to his state of mind in May of 19—let's see, in April and May of 1959, at the time he was on constant communication with the defendant Palermo.

There is in evidence, as a matter of fact, according to his testimony, three telephone calls with Palermo on May 4th and May 5th, and one of them to Palermo's George Tobias on the 5th, and on the 6th——

The Court. Evidence through him?

Mr. Goldstein. Yes. And on the 6th Palermo and Sica show up at the Hollywood Legion Stadium, and on the 5th Dragna and Palermo—on the 4th Dragna and Palermo were at the Hollywood Legion Stadium.

Mr. Strong. I ask your Honor this question: Would it be proper for anybody to ask this witness on the stand, "Is it your understanding that Mr. Palermo is a member of the underworld?"

Wouldn't you strike that out as a conclusion? If you can't ask it directly, I say to your Honor you

can't get it in indirectly in any fashion or form you propose.

There can't be such a characterization. It is a matter of opinion and consequently it wouldn't be proper evidence here. No matter how you get it in it is improper.

Mr. Parsons. May I say the defendant Sica joins in the remarks made by counsel and we object to any such question on the ground it is immaterial, irrelevant and incompetent, and hearsay as to Sica.

I want to point out, your Honor, that asking about the underworld is a nebulous thing and it is against the rules laid down in Lansetti v. New Jersey. It is so uncertain as to be undeterminable.

Mr. Beirne. I join in all the objections made by my colleagues and the classical objection that it is incompetent, irrelevant and immaterial, not proper cross examination, not within the issues of the case and hearsay. I assign the asking of the question as prejudicial misconduct and request the jury be instructed to disregard it.

Mr. Parsons. I join in that.

Mr. Strong. So do I.

Mr. Ming. There is nothing in the questions he read dealing with questions of fact. Mr. Gibson testified that he talked to Mr. Palermo on the telephone and he testified what he talked to Mr. Palermo about. There is nothing in that transcript that has anything to do with that. Certainly, it has nothing to do with the matter of the alleged conversation between Mr. Palermo or Mr. Dragna or Mr. Sica, or whoever it

was, so I would suggest, your Honor, this is an effort to bring in illegal fraudulent issues that couldn't be brought in by a witness. It is highly prejudicial to the defendant Gibson and would be a violation of his constitutional rights to a fair trial if the question is allowed to be answered.

Mr. Strong. May I make a further motion at this time, your Honor? I move now again for a mistrial on the ground we are not getting a fair trial according to the rules of law and due process.

The Court. The motion for mistrial is denied.

Mr. Bradley. I join in all the other motions and on the additional ground this is an attempt of impeachment on purely collateral matter of the issues at trial, under this indictment.

The Court. The court will rule on it after the noon recess. We have gone into the noon hour.

Now, Mr. Gibson, you are here with the other defendants at side bar. Just bear in mind the ruling of the court might be—I am not saying it will be—it might be you have to answer the question.

So we will recess until a quarter of 2:00.

(The following proceedings were had in the presence and hearing of the jury:)

The Court. Members of the jury, that side bar conference took us into the noon hour. So we will take the luncheon recess until 15 minutes before 2:00.

Bear in mind the admonition which I have given you at length before and keep your minds open. Be back at a quarter of 2:00 for resumption of the trial.

(Whereupon, at 12:04 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

Los Angeles, California, Friday, April 28, 1961, 1:52 P.M.

(Whereupon the following proceedings were had in open court in the presence and hearing of the jury:)

Truman K. Gibson, Jr.,

one of the defendants herein, resumed the witness stand on his own behalf, having been previously duly sworn, and testified further as follows:

The Court. The defendants are present; counsel here as before.

The objection to the pending question is overruled. However, Mr. Gibson may have a little latitude in answering it, beyond just straight inquiry, because there is a term in it which is subject to various definitions. Can you read it?

Mr. Parsons. I don't want to belabor the point, but, as to Mr. Sica it is hearsay, your Honor, and made long subsequent to, as you have heretofore explained.

The Court. Yes. Well, I hope my explanation will stand. This is being received purely by way of cross examination of the defendant Gibson and may be received only as to the defendant Gibson.

Mr. Ming. Your Honor, I will object on the ground that it is grossly improper, that it is outside of scope of direct examination, that it is vague and ambiguous and so vague and ambiguous that to permit the question to be asked is to deny to the defendant Gibson a fair trial in violation of the Fifth Amendment of the Constitution of the United States.

The Court. The court has made its ruling and will consider all objections which were voiced at side bar as being restated at this time and overruled by the court's overruling the objection to the question without the necessity of counsel restating anything which has been said before.

Mr. Strong. Your Honor, could that ruling and the objections go to this entire series of questions from that same report that we discussed at side bar and material that we discussed, and then we won't have to keep popping up on it?

The Court. Well, it will go to the next few questions. I don't know how long Mr. Goldstein is going to work from this transcript.

Mr. Strong. I mean just so your ruling on the objections and so that the objections will apply to the material discussed.

The Court. It will apply to this specific episode.

Mr. Strong. Yes.

The Court. And let us know when you think you are shifting from the episode, Mr. Goldstein.

Mr. Goldstein. Yes, your Honor.

May the reporter repeat the question? I have a copy of the transcript and I can repeat it, unless it will complicate matters.

The Court. Yes.

Mr. Ming. I am sorry. We can't hear you, Mr. Goldstein.

The Court. He says he will repeat it unless it will complicate matters. But we have had the ruling. I think the particular reporter who was taking the testimony this morning is not here at the moment, so

that if you will repeat it, Mr. Goldstein, I suggest you do so from transcript. I have been provided with the last or with the pending question. I take it you have. If you haven't, you may use mine.

Mr. Goldstein. Yes, I have, your Honor.

Mr. Williams. Would your Honor care to have it?

The Court. No. I have it.

Cross Examination (Continued)

By Mr. Goldstein:

Q. Mr. Gibson, was it the policy of the International Boxing Club, during the time you were an officer, to use the underworld to the extent that you could in the operation of your business?

A. That question I answered before the Kefauver Subcommittee. The question was based on a colloquy and a delimitation of the term "underworld" by Mr. Kittrie, a Committee counsel, who said that the term was not being used in its judicial sense but in the legislative sense of looking toward the future; and I answered it in the light of a pending piece of legislation that would be introduced by Senator Wylie that had a definition of a certain category of offenses for which persons who had been convicted of those offenses would be deemed guilty of a federal offense if they engaged in the field of boxing. I answered in terms of those—the definition of "underworld" in light of the Wylie bill and the Kittrie remark, yes.

The Court. Well, Mr. Gibson, the question was not what you had testified to before the Committee, but to the fact, the fact if it was a fact, or whatever

the fact was, you either did or did not, was it the policy of the International Boxing Club, during the period you were an officer, to use the underworld to the extent that you could in the operation of your business, and the answer you gave was a commentary upon how the word "underworld" was used in the testimony you gave before the Kefauver Committee. Now, would you answer the question that Mr. Goldstein put, and then we might get to the Kefauver testimony and we might not.

The Witness. I can't answer it, your Honor, without knowing what Mr. Goldstein means by the term "underworld."

Mr. Goldstein. I attach to it its common definition, Mr. Gibson, and ask you to apply whatever understanding you might have of that word.

Mr. Ming. Just a moment. Your Honor, I suggest there is no such thing as a common definition of any word, and therefore, the question is objectionable, as being, as I pointed out before, so vague and ambiguous so as not to be a proper question.

The Court. Well, there is a dictionary of contemporary American usage. I have just sent the bailiff to get it. We will see if the word is set forth there and if so, while I don't mean that you must use the word with tying to it that particular definition, it might give you a base from which to operate and accept Professor Bergen Evans' definition, or state what you mean by "underworld."

Mr. Ming. You mean for Mr. Goldstein to state what he means by "underworld"?

The Court. Yes.

Mr. Ming. In his question.

The Court. Yes, in his question, so Mr. Gibson will know what his answer will be.

Mr. Goldstein. Well, I certainly don't intend to tell Mr. Gibson what the word "underworld" means. It is what Mr. Gibson thinks the word "underworld" means that is relevant. It is not what I think about it. I have some very clear views on what "underworld" means, but I think it might be error for me to state those views in the presence of the jury.

Mr. Ming. In that event, your Honor, I will renew my objection.

Mr. Strong. The same objection.

The Court. Well, we are in the position where the witness claims inability to understand what you are driving at.

Mr. Goldstein. All right. Then I will ask——

The Court. Isn't that the situation, Mr. Gibson?

The Witness. Yes, sir.

The Court. You want to know what he means by underworld, so tell us what you mean when you use that word.

Q. By Mr. Goldstein. Mr. Gibson, do you recall testifying before the United States Senate on December 5, 1960 and being asked the following questions and giving the following answers——

Mr. Ming. Now, just a moment, Mr. Goldstein.

The Court. We can't come to an impeaching procedure unless the witness has first come into the giving of testimony which you seek to impeach.

Mr. Goldstein. My point is, your Honor, that apparently on December 5, 1960 he knew what the word "underworld" meant and I will simply ask him to attach and attribute that definition as of December 5, 1960 in answering the question.

The Court. All right.

Mr. Ming. Your Honor——

The Court. Mr. Gibson has told us what—I think he has, haven't you, sir?

The Witness. Yes, sir.

The Court. —what he understood the word "underworld" meant as used before the Senate Committee and if that is so, that definition is taken as a definition by which Mr. Goldstein wants the question answered.

Mr. Ming. Well, now, your Honor, so that the record will be perfectly clear and so I—I am sorry, your Honor—so that the record will be perfectly clear and I at least will know what is going on, is that the definition which Mr. Goldstein intends in his question?

The Court. I don't know.

Mr. Ming. Neither do I, your Honor, and until we find out, I suggest that the question is not proper; that the procedure is not consistent with orderly procedure.

The Court. I should think, from what Mr. Goldstein has said, that he wants the question answered with respect to that understanding of the term "underworld."

Mr. Goldstein. He, in his previous answer, did not define the term "underworld," your Honor.

The Court. The dictionary doesn't help us too much either. The dictionary says it is a place of departed spirits.

Mr. Strong. If that is the definition applied by the dictionary, I withdraw my objection.

The Court. Well, there is a second definition: The side of the globe opposite to one.

Then, a definition No. 4: The lower debased or criminal portion of humanity.

Those are dictionary definitions.

I am sorry to recess briefly. I don't think you need to leave the room. As you know, courts have many cases. I have 162, besides this one, that is, 162 civil cases, besides a number of criminal cases, and in connection with one of those cases I have what appears to be an urgent telephone call, so I will have to go and take that. Be at ease, but remain in the courtroom.

(Whereupon, a recess was taken from 2:03 o'clock p.m. to 2:06 o'clock p.m., and thereupon, the following proceedings were had in open court in the presence and hearing of the jury:)

Mr. Goldstein. May I proceed, your Honor?

The Court. You may proceed.

Q. By Mr. Goldstein. Mr. Gibson, was it the policy of the International Boxing Club, during the time you were an officer, to use the underworld to the extent that you could in the operation of your business?

Mr. Ming. Just a moment. Your Honor, that's the question to which the objection was made. I will repeat the objection, that the term "underworld" is

so vague and indefinite as to constitute the question an ambiguous and improper question, and therefore, the objection ought to be sustained, unless there is a definition by the person asking the question as to what he means by the term.

Mr. Goldstein. I will respectfully submit that is nonsense, your Honor.

Mr. Ming. Well, now, your Honor——

The Court. I don't think it's an unreasonable position, counsel. There have been different meanings to the term given at different times. Mr. Gibson has given one which he understood was being used by the Committee. Whether it was or not would remain for other evidence to establish, but because the Committee knows its purpose, it I suppose recorded the term somewhere, but certainly the witness would be entitled to know just what class you are inquiring about, because we don't ordinarily classify by any moral or legal standard the people with whom we are doing business; I don't say, "Well, we have a shyster coming in today," nor do I say, "We've got a real legal genius coming in today"; I recognize we have a lawyer. Now, you are asking him now to relate in a proceeding today whether it was his practice or the practice of his organization to deal with an uncertain class which you designate as underworld and I think you should tell him what that class includes within the meaning of your question.

Q. By Mr. Goldstein. Mr. Gibson, did you know what the word "underworld" meant when Mr. Bonomi asked you the questions before the Senate Committee in 1960?

Mr. Ming. Now, just a moment. I will object to that upon the ground that it is irrelevant, your Honor, and beyond the scope of the direct, as to what he knew a word to mean at a day not relevant to these proceedings and certainly not——

The Court. Overruled; overruled. We have got to have a few searching questions here in order to get a predicate for the testimony that Mr. Goldstein is going after primarily.

Mr. Ming. May I respectfully suggest, your Honor, all we need is a definition of the term from the questioner.

The Court. It's a term that is susceptible to many modifications and the like. The witness has said that before the Senate Committee he understood it to mean a certain thing. Now, counsel is entitled to probe a little with this witness in setting up the standard that is to be used for the inquiry. Your objection is overruled.

Mr. Ming. Well, then, your Honor, I have a motion to strike the question with which we began the proceeding, since it is not to be defined.

The Court. Well, we have moved away from that question without its being answered. We have moved into seeking definitions.

Mr. Ming. Then I must respectfully suggest that that is improper, your Honor, seeking definitions about matters which are not relevant to these proceedings.

The Court. No, Mr. Ming. We are going to be practical here in trying the lawsuit; nobody is going

to be put in a straitjacket, semanticwise, a semantic straitjacket or otherwise. But the objection to that question is overruled. Read the question, Mr. Reporter.

(Pending question read by the reporter as follows:

"Mr. Gibson, did you know what the word 'underworld' meant when Mr. Bonomi asked you the questions before the Senate Committee in 1960?")

A. No, I didn't know what the word meant, but I knew the context in which it was used before that Committee or in which Mr. Bonomi used it. I didn't use it.

Q. By Mr. Goldstein. Were you asked this question before the Senate Committee on December 5, 1960, and did you give this answer——

Mr. Ming. Excuse me, Mr. Goldstein.

I will object to any reading of that transcript on the ground it is not shown to be relevant to any issue in this proceeding. It is not proper procedure. There is nothing here which goes to impeachment, because there is nothing to impeach.

Mr. Strong. Same objection. On the further ground that it is hearsay as to my client, not within the issue of this case.

The Court. Sustained.

You have to get—before you impeach something you have to get something to impeach.

Mr. Goldstein. I submit there is something to impeach.

The Court. There might be, but I am not too sure. I am not too sure. I would like to know what this

witness' understanding of the word "underworld" means, if he can give us a definition.

Maybe, Mr. Gibson, it would help you if I gave you this definition from Webster's New Collegiate Dictionary.

"Underworld" means "The lower, debased, or criminal, portion of humanity."

Mr. Strong. What does that mean, your Honor, "the lower portion of humanity"?

The Court. I am not going to argue with you. Please let Mr. Gibson answer my question. I want him to tell us what he understands "underworld" to mean. I read him a dictionary definition of it for his aid. Not necessarily to impose it upon him.

Mr. Ming. Your Honor, I most respectfully object to this procedure. It is not what Mr. Gibson means by a word, it is what the questioner who asked the question meant by the word. We have had no definition from Mr. Goldstein. In fact, we have had an absolute refusal on his part to define it or to accept your Honor's several dictionary definitions.

The Court. I think, considering the entire record, considering the answers this witness has given at other places, that it is not unreasonable to ask him to define the word.

Mr. Ming. What somebody else used?

The Court. Well, sir, I don't want to argue with you further. If I am in error, the upper court can correct me.

The judge who proceeded me on this bench, at about this point in the case, where I was trying, said, "Sit down and shut your mouth."

Mr. Ming. Well, your Honor——

The Court. The lawyer——

Mr. Ming. —I must respectfully suggest——

The Court. Well now, just a minute. Let me finish my story. It might not be very good, but I seldom get the floor.

The lawyer said, "Let the record show I am sitting down but I can't represent my client with my mouth shut."

I think I have heard you out on this. We had a long conference at the side bar. We are going to proceed in this fashion, and if it is prejudicial the gentlemen upstairs can take action on it.

Mr. Ming. May I respectfully suggest, your Honor,—I do this only personally—No. 1, that it is an unfortunate story. I think it is funny but unfortunate.

Secondly,——

The Court. You can't represent your client with your mouth shut.

Mr. Ming. That is correct, your Honor, I cannot.

The Court. I did not mean to imply that you are gagged, but I think the colloquy on this problem has reached the stage that the usefulness of it has been exhausted.

Mr. Ming. Well, I am sorry, your Honor, I must respectfully disagree with you and I must object to the procedure because I regard it as improper and I would not be doing my duty either to my client or to the court if I did not point that out.

The Court. Well, I certainly am aware, being not entirely an unperceptive person, that this procedure

is considered objectionable to you. But I am going forward with it.

Can you tell us, sir, Mr. Gibson, what you understand "underworld" means? You may use or depart from the dictionary definition as you see fit.

The Witness. I can tell you what I meant before the Kefauver Committee where the word was used, and Mr. Goldstein asked me about Mr. Bonomi's use of the expression before that Committee.

The Court. We haven't gotten to the Kefauver Committee yet. I don't mean to depreciate you. But you are not exactly a young man. You have been around. What does the word "underworld" mean to you, sir?

It means something to you. I think it must mean something to every one of the jurors. What does it mean to you?

The Witness. The last question had to do with Mr. Bonomi's use of the word before the Committee.

The Court. Now, this last question did not.

Read the last question.

(Whereupon, the following question was read:

"What does the word 'underworld' mean to you, sir?")

The Court. That means right now, here you are in Court Room No. 6, 312 North Spring Street in Los Angeles. You are sitting here and we want to know what you understand the word "underworld" means, because it is going to be used in some questions put to you and you just tell us so that we will have you and Mr. Goldstein in the same terms of reference.

The Witness. I consider it to mean people who have been convicted of crimes of certain degrees and certain natures.

Q. By Mr. Goldstein. Mr. Gibson, was it the policy of the International Boxing Club, during the time you were an officer, to use the underworld to the extent you could in the operation of your business?

Mr. Strong. Same objection as heretofore made at the bench.

The Court. Overruled.

The Witness. Yes.

The Court. You are still under the umbrella, Mr. Strong.

Mr. Strong. Thank you, your Honor.

The Witness. Yes.

Mr. Goldstein. No further questions.

Mr. Ming. I was going to ask your Honor if we might have a conference at the side bar with regard to the succession of witnesses, this being Friday afternoon.

DEFENDANT GIBSON'S SPECIAL INSTRUCTION F

There is uncontradicted evidence that the defendant Gibson has a good reputation for honesty and integrity in the community where he resides. The circumstances may be such that an established reputation for good character alone may create a reasonable doubt as to the guilt of the defendant Gibson. You should take that evidence of good reputation into consideration along with all the other evidence as to him in determining the guilt or innocence of Mr. Gibson.

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In this case we have the conflict of problems that arises from that in the case of Defendant Gibson. As I recall it, the defendant Gibson was the only one who put his reputation in evidence. He called witnesses and they were asked questions, "Is his reputation good or bad?" And they said it was good.

That is offered as to someone under the same principle I mentioned regarding the Governor of New York. Mr. Gibson, of course, doesn't claim to be a governor of any political subdivision. He claims to be an active managing head of substantial commercial interests. He claims to be a member of the bar, and he claims to have a good reputation. This is not to say that people of good reputation are entitled to go and commit crimes. No one is entitled to commit crimes. But there might be instances, as in that possibly now getting about to the limit of its usefulness in instructions, that case we mentioned as to the Governor of New York being charged with robbery.

The jury is entitled to consider whether a person having such a reputation would commit such an offense. It is all up to you and you are to integrate all of this evidence. You are to integrate all of these instructions. Take nothing as an isolated matter. Consider the picture as a whole.

* * *

But so far as the reputation of any defendant is concerned, the only evidence here on what the reputation actually was of any defendant is that Gibson has offered evidence that his reputation was good.

Insofar as I can recall, strictly in the field of reputation evidence, that is, someone getting on the stand and saying, "I know what his reputation is," there was no evidence to the contrary.

But bear in mind that reputation evidence does have a very limited purpose in the trial.

* * *

No. 17,762.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

PAUL JOHN CARBO, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT FRANK PALERMO.

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UNITED STATES OF AMERICA,
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BRIEF FOR APPELLANT FRANK PALERMO.

JURISDICTION.

The appellant, Frank Palermo, was indicted with others in the United States District Court for the Southern District of California (Central Division), upon charges based upon 18 U. S. C., Section 371, 875(b) and 1951. Following trial by jury, appellant was convicted and sentenced. The judgment and commitment were entered on December 2, 1961 (TR 1496).[1] Notice of appeal was filed on December 2, 1961 (TR 1520). Jurisdiction existed in the district court pursuant to 18 U. S. C. Section 3231 and Rule 18, Fed. Rules Crim. Pro. Jurisdiction of this Court to review the final judgment of the district court is based upon 28 U. S. C. Sections 1291 and 1294(1).[2]

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1. References designated "TR" are to the Clerk's Transcript of Record on Appeal filed and docketed on February 13, 1962 in this Court. References designated "R." are to the record of the trial.

2. Pertinent statutes are set out in Appendix A, *infra*.

STATEMENT OF THE CASE.

The indictment contains 10 counts, seven of which charge this appellant:

Count One charges a conspiracy with defendants Carbo, Sica, Dragna, Gibson and unindicted Daly to obstruct interstate commerce by means of extortion in violation of 18 U. S. C. Section 1951. Paragraph 3 thereof alleges that the objects of the conspiracy were that Palermo and Carbo, by use of threats of physical harm and violence and threats of economic loss and injury to the victims Donald Paul Nesseth and Leonard Blakely (hereinafter referred to as Leonard), were to obtain monies representing a share of the purses earned by a professional prize fighter then engaged in championship matches being nationally televised, Don Jordan, and to obtain control of the professional activities of Don Jordan by naming his opponents and the places where and conditions under which he would engage in such matches; that defendants would enlist the services of persons known to the said victims to have "underworld reputations and to possess the necessary power to execute the conspirators' demands by force and violence", and did enlist the defendants Sica and Dragna for this purpose, that is, to personally contact Leonard and Nesseth to obtain their agreement to the conspirators' demands; and that the defendant Gibson would use his power as an officer of a major promoter of nationally televised fights "and an influential figure in other business associations" to persuade victims Leonard and Nesseth to accede to the demands of the conspirators for the control of Jordan.

Count Two charges that in violation of 18 U. S. C. Section 1951, appellant Palermo and defendant Sica obstructed interstate commerce, and attempted to do so, by extortion of $1,725.00 from Leonard by threatening him with physical injury.

Count Four charges that in violation of 18 U. S. C. Section 1951, appellant Palmero and defendant Sica obstructed interstate commerce and attempted to do so, by extortion, by attempting to coerce Nesseth into giving up a part of his contractual right to control Jordan by signing a match between Jordan and one Hart contrary to the wishes of Nesseth, through the wrongful use of force and fear.

Count Five charges the same persons named in Count I with conspiracy, pursuant to 18 U. S. C. Section 371, to commit an offense under 18 U. S. C. Section 875(b), i.e., to transmit in interstate commerce communications containing threats to injure Leonard and Nesseth with intent to extort moneys and a thing of value, i.e., a share of the management of Don Jordan.

Count Six charges that the appellant Palermo on January 27, 1959, with intent to extort a share of the management of Don Jordan, transmitted in interstate commerce a threat to injure Leonard in violation of 18 U. S. C. Section 875(b).

Count Eight charges that on April 28, 1959, appellant Palermo, with intent to export a share of the management of Don Jordan, transmitted in interstate commerce a threat to injure Leonard and Nesseth in violation of 18 U. S. C. Section 875(b).

Count Ten charges that on April 29, 1959, appellant Palermo, with intent to extort a share of the management of Don Jordan, transmitted in interstate commerce a threat to injure Leonard and Nesseth in violation of 18 U. S. C. Section 875(b).

This case concerns two independent transactions, one between the appellant Palermo and Jackie Leonard (whose real name is Blakely) with respect to services performed on behalf of the prize fighter Jordan by Palermo, and the other between Leonard and the appellant Gibson with respect to the Hollywood Legion Stadium. The Government attempted to tie these two together to show a conspiracy to

extort by threats from one Nesseth and Leonard moneys and a share in the fighter Jordan and to dictate Jordan's future boxing events.

The substance of the case is the testimony of Leonard, who is the only person allegedly threatened or from whom anything was allegedly demanded. It is from his mouth alone that all assertions of threats and fear of physical injury are derived.

It is in this context that, by way of rebuttal, the Government introduced into evidence Exhibit 177 over the objection of appellant. This Exhibit is a recording of a telephone conversation between Leonard and Palermo on May 5, 1959 made by an officer of the Los Angeles police department by attaching, with Leonard's consent, an induction coil to his home telephone. This Exhibit was requested by the jury to be played during the course of their deliberations.

In his charge to the jury, the trial judge did not instruct that should the jury have a reasonable doubt as to an essential element of an offense or of the guilt of a defendant, he must be acquitted. The jury was thus left without a specific direction as to its right and duty to return a verdict of not guilty, although in one instance the court did tell the jury that the Government was entitled to a verdict.

Again, the trial judge omitted to instruct the jury, despite several written requests on this score, that the conspiracy must be proved by independent evidence and that the acts and declarations of a defendant's alleged co-conspirators in his absence could not be used to establish the existence of the conspiracy. When this omission was called to the trial judge's attention, upon the conclusion of the charge, it was corrected only as to Gibson, but not this appellant, and an exception was granted to appellant.

The verdict was returned on May 30, 1961. Post-trial motions were filed, but before they could be briefed or argued, the trial judge, on June 11, 1961, died. Thereafter

further motions were filed requesting a new trial on that ground. However, Judge Boldt was assigned to the case, and he determined, in a written memorandum filed on October 13, 1961 (TR 1342), that he was satisfied that a successor judge could determine matters remaining to be determined in the case and denied the motion for new trial based on that ground. Thereafter, Judge Boldt heard the post-trial motions and decided them against the appellants on November 28, 1961 (TR 1446). On December 2, 1961, the appellants were sentenced. This appellant's sentence was fifteen years on Count 1 and a fine of $10,000; five years each, consecutively, on Counts 2, 4 and 5; five years each, consecutively, on Counts 6, 8 and 10; but that the sentence of imprisonment imposed on Counts 2, 4, 5, 6, 8 and 10 should run concurrently with the sentence of imprisonment imposed on Count 1 (TR 1496).

SPECIFICATION OF ERRORS.

1. The court below erred in admitting into evidence and permitting to be played to the jury a recording illegally obtained of a telephone conversation between Palermo and Leonard.

Government Exhibit 177 is a recording made by an officer of the Los Angeles police department on May 5, 1959, at the home of Leonard of a telephone conversation between Leonard and Palermo. It was obtained through an induction coil device attached to Leonard's telephone with his consent but without the knowledge of Palermo. The exhibit was marked for identification at R. 6711 and received in evidence at R. 6726. (See Abstract, pp. 1297-1299.) Objection was made as follows (R. 6712-6715):

> "Mr. Strong: To which I now object, your Honor, to the introduction or receipt in evidence of this recording on the basis of the Fourth and Fifth Amendments, in the Nardone case.

* * *

"Mr. Ming: Thank you. I would also like to object, your Honor, to the admission on the ground of violation of the limitations of both the Fourth and Fifth Amendments of the Constitution of the United States and more particularly as to the provisions of Section 605 of 47 United States Code, which specifically provides that no person not being authorized by the sender shall intercept any communication and divulge the existence, contents, etc. to any person, and I would ask the court to examine that statute which has been continuously applied by the Supreme Court and the Federal Courts.

* * *

"Mr. Parsons: The defendant Sica objects, your your Honor, on the grounds it is incompetent, irrelevant and immaterial, it amounts to violation of the Fourth and Fifth Amendments of the Constitution of the United States, and it amounts to a denial of due process of law, and as far as we know now it is heresay as to him, it is a direct violation of 47 U. S. C. Section 605.

* * *

"Mr. Beirne: May I interpose an objection on behalf of the defendant Carbo on the same grounds as stated by Mr. Ming and Mr. Parsons and Mr. Strong also.

"Mr. Bradley: And I join in the objection of all counsel.

* * *

"Mr. Strong: I am very gracious, then. I join in all the objections, in case they objected on broader grounds than I did."

2. The Court erred in its instructions as to the jury in failing to instruct in the total charge (R. 7634-7735) as to when the appellant must be acquitted.[3]

At no time in its charge did the Court instruct the jury that if the Government failed to establish beyond a reasonable doubt all the essential elements of the offenses charged, then the defendant must be found not guilty. This omission is fundamental error and appellant is entitled to a new trial even though no specific exception was taken. Nevertheless, the Court did instruct the jury that (R. 7642):

> "and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict."

This aggravates the omission and further constitutes fundamental error as removing from the jury its ultimate right to determine guilt.

3. The Court erred in refusing to instruct the jury that membership in a conspiracy cannot be proved by the declarations of co-conspirators, but must be proved by independent evidence.

Upon the conclusion of the charge, at the time of discussion and exception, on behalf of appellant Palermo it was pointed out that the Court had omitted requested instructions and exception was noted (R. 7713). Thereupon, however, the Court instructed the jury:

> "Now, in this regard you will recall that there is a principle that if a conspiracy actually exists, after it has come into being, that anything said by any one of the co-conspirators, if said for the purpose of furthering the conspiracy, is evidence against all.
>
> That, of course, I reaffirm, but I do not mean to re-emphasize it, but when I gave it to you before this

3. Since this specification involves an omission from the *entire* charge, the entire charge is not therefore reprinted.

morning I omitted by inadvertence the other statement given today, and to put it in context I repeat it.

> 'You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant not in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy.'
>
> You probably realize, and you are now told Mr. Gibson is a defendant only in the conspiracy counts." (R. 7714-7715)

Thereupon, exception was taken as follows (R. 7719):

> "Mr. Strong: In giving the instruction with relation to Mr. Gibson and using his name, actually they apply to the defendant Palermo.
>
> "Mr. Beirne: All of the defendants. The declarations [and] acts of a co-conspirator can't be used to establish a conspiracy. It must be proved by independent evidence. Membership in a conspiracy cannot be proved by declaration, that must be proved by independent evidence.
>
> * * *
>
> "The Court: . . . your exception is noted."

4. The appellant Palermo is entitled to a new trial by reason of the death of the trial judge prior to the determination by him of the post-trial motions.

On October 13, 1961, Judge Boldt, assigned as successor judge, entered a memorandum denying a new trial

by reason of the death of the trial judge and granting to each defendant an exception (TR 1342-1344). The pertinent part of the memorandum is as follows:

> "* * * At the time of Judge Tolin's death on June 11, 1961, sentence had not been imposed on any defendant, and ruling had not been made on the Dragna motion for acquittal, a written acquittal motion of defendant Gibson or on any of the new trial motions.
>
> On June 26, 1961, by order of Chief Judge Hall pursuant to Fed. Crim. Rule 25, this cause was assigned to the undersigned as successor judge for the conduct of all further proceedings herein. All defendants filed supplemental motions for new trial on the asserted ground that judicial duties in the case cannot be performed properly by a successor judge. * * *
>
> The supplemental motions are principally based on the contention that because a successor judge was not present at the trial he cannot acquire "the feel of the case" sufficiently to understand and exercise sound discretion in various matters including appraisal of the credibility of the evidence supporting the verdict. In order to fully and fairly consider this contention an extensive and detailed study has been made of all testimony and proceedings in the case. A complete and detailed abstract thereof has been prepared which, when typed in final form, will be filed as an appendix to this order.
>
> The record clearly shows that the able and experienced trial judge conducted the entire proceedings with remarkable patience and restraint, giving fair and thoughtful attention to the frequent and numerous objections and contentions presented by veteran and vigorous counsel. From a review of the entire record it appears to my complete satisfaction that all judicial duties and functions subsequent to verdict, including

evaluation of the evidence for all necessary purposes, can and should be performed by a successor judge. To do so will require much time, effort and concern. Such considerations, however, will not justify evasion of judicial duty by the simple and easy solution of granting a new trial. After extensive consideration of the matter I have reached the firm conclusion and conviction that a successor judge, within the limits of his character, ability and experience, can decide all undetermined issues in the case without impairment in any respect or degree of the lawful rights of any defendant. Accordingly, without prejudice to or ruling on any other contention asserted in any other pending motion, it is hereby

ORDERED that each and all of defendants' supplemental motions for new trial be and the same hereby are denied. Exception allowed to each defendant."

It is the contention of the appellant that in the circumstances of this case a successor judge could not determine the post-trial motions and do substantial justice in the matter.

5. The appellant Palermo incorporates herein by reference the specifications of error stated by each of the other appellants in this cause.

ARGUMENT.

1. The Appellant Is Entitled to a New Trial by Reason of the Use of Illegally Obtained Evidence.

(Specification of Error No. 1.)

The Government succeeded in having admitted into evidence over appropriate objection, Exhibit 177, which is a recording made by an officer of the Los Angeles police department on May 5, 1959, of a telephone conversation between Leonard and appellant Palermo. This recording was obtained by attaching an induction coil to Leonard's telephone with his consent to pick up the conversation and transmit it to a recording device (R. 6708-6726).

Section 605 of the Federal Communications Act of 1934, 47 U. S. C. Section 605 provides in pertinent part:

> "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted message communication to any person * * *"

This statute establishes the public policy against the "dirty business" of the eavesdropper's intrusion recognized and eloquently decried against by the dissenting justices in *Olmstead v. United States,* 277 U. S. 438 (1928). Despite the statute, such eavesdropping continued by law enforcement officers, state and federal, as well as private persons. All are lawbreakers under the Act. In *Nardone v. United States,* 302 U. S. 379 (1937), the Supreme Court dealt a lethal blow to arguments seeking to limit or rationalize the legislative proscription so as to permit the eavesdropping and use of the evidence obtained thereby. That "no person" does not mean "no person except [a law enforcement officer]" and "divulge" does not mean "divulge except [in court]" is the plain decision of the Court:

> ". . . the plain words of Section 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that *'no person'* shall divulge or publish the message or its substance to *'any person'*. To recite the contents of the message in testimony before a court is to divulge the message . . .
>
> It is urged that a construction be given the section which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of crime. The answer is that the question is one of policy. Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty. The same considerations may well have moved Congress to adopt Section 605 as evoked the guarantee against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution" (302 U. S. at pages 382-383). (Emphasis in text.)

The rather patent flouting of the clear meaning of this decision by the Government, in using testimony which was indirectly the result of illegal interception, was denounced in the second *Nardone* decision, 308 U. S. 338 (1939). This decision unequivocally applied the policy excluding from evidence "the fruit of the poisonous tree"—the products and by-products of illegal interception.

Further, the Supreme Court has determined that Section 605 applies to intrastate as well as interstate communications. *Weiss v. United States,* 308 U. S. 321 (1939). And from *Schwartz v. United States,* 344 U. S. 199 (1952), it is clear that violation of the federal statute by a state officer, even though his conduct was pursuant to state law,

is subject to federal prosecution. In *Benanti v. United States,* 355 U. S. 96 (1957), it was held that evidence obtained through wiretapping by state officers was inadmissible in a federal court. So also, it has been held that a federal employee, prosecuted for disloyal conduct, may successfully object to the use of evidence obtained by monitoring calls including those passing over the telephone assigned to such employee at work. *United States v. Coplon,* 185 F. 2d 629, 636 (2d Cir. 1950), cert. denied, 342 U. S. 920.

Unquestionably the courts are committed to the proposition that the Act is a compelling and inflexible bar to the use and reception of evidence obtained by intercepting telephone messages. For this reason, it was reversible error to receive into evidence Exhibit 177. The significance of this item of evidence is emphasized by the fact that the jury had the recording played while it was in the course of its deliberations (R. 7760).

It is further submitted that the circumstances under which the recording was obtained constitute a violation of appellant's rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution. Cf. *Elkins v. United States,* 364 U. S. 206 (1960); *Mapp v. Ohio,* 367 U. S. 643 (1961).

2. The Court Omitted to Instruct the Jury in Plain Words When It Must Acquit, and This Constitutes Fundamental Prejudicial Error.

(Specification of Error No. 2.)

The charge of the trial court was designed to tell the jury when it should convict. Indeed, one cannot but come to the conclusion that the charge evinces a conscious effort to avoid the words "not guilty" and "acquit". But the Court did clearly emphasize when the jury could convict. This one-sidedness is highlighted by the instruction (R. 7642):

> "While remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government *is entitled to a verdict.*" (Emphasis supplied.)

It is submitted that the quoted instruction essentially constitutes an instruction to convict. That such an instruction is fundamentally erroneous and per se reversible error as removing from the jury its ultimate right to determine guilt is well-settled.

As stated in *United States v. Gollin,* 166 F. 2d 123 (3d Cir. 1948), cert. denied, 333 U. S. 875, at page 127:

> "The District Judge was without power to direct a verdict of guilty although no fact might have been in dispute. Sparf & Hansen v. United States, 156, 51, 105; United States v. Taylor, c.c. 11 F. 470; Atchison T. & S. F. Ry. Co. v. United States, 7 Cir. 172 F. 194. And what a judge is forbidden to do directly he may not do indirectly. Peterson v. United States, 8 Cir., 213 F. 920."

As further pointed out in that decision, even an earlier instruction (which was not given in the case now on appeal) that if the jury did not find such facts it must acquit, does not cure such error.

It is an inherent feature of trial by jury, protected by the Federal Constitution, that it is the jury's exclusive function to determine the question of the defendant's guilt or innocence. *United States v. Link,* 202 F. 2d 592, 595 (3d Cir. 1953). In that case, the Court recognized the significance of the district court's error:

> "Trial judges must always keep in mind the possible, if not probable, effect of any statement which they might make in the course of a trial, or in their instructions to the jury. As was said in Starr v. United States, 1894, 153 U. S. 614, 625:
>
> 'It is obvious that under any system of jury trials the influence of the trial judge on the jury is neces-

> sarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling.'
>
> In Bollenbach v. United States, 1946, 326 U. S. 607, the Supreme Court quoted with approval this statement in Starr v. United States and in so doing noted that * * * *jurors are ever watchful of the words that fall from him* (the trial judge). *Particularly in a criminal trial, the judge's last word is apt to be the decisive word.''* (Emphasis in text.)

The statement of the court that ''a defendant is entitled to any reasonable doubt'' hardly qualifies as a clear instruction.[4] It was required of the court to instruct the jury what in law is the absolute duty of the jury, where it has a reasonable doubt it must return a verdict of not guilty. In *McKenzie v. United States,* 126 F. 2d 533 (D. C. Cir. 1942), the court said at page 536:

> ''And the failure to say in plain words that if the circumstances of the identification were not convincing, they should acquit, was error. Passing upon a similar question in McAfee v. United States, 70 App. D. C. 142, 105 F. 2d 21, we said on this subject, it should be orthodox practice somewhere in the instruction to tell the jury in precise terms that a ''not guilty'' verdict is necessary in the event of failure by the government to prove each of the elements of the offense beyond a reasonable doubt.
>
> In that case, as in this, the court told the jury in the usual terms that the defendant was presumed innocent and that the government was obliged to rebut this presumption by proof of guilt beyond a reasonable doubt. But in that case, as in this, the court failed to

4. Various of the requested instructions for charge filed did ask that if the jury did not find the elements to which the specific requests were directed, then the jury must acquit the defendants. Palermo's request "C" (TR 687), and others included by reference (TR 683): requests nos. 6 (TR 649), 20 (TR 664), 22 (TR 665), 24 (TR 667), 25 (TR 668), 27 (TR 670), 32 (TR 675).

say in terms, that unless they found from the evidence beyond a reasonable doubt that all of the elements of the crime charged existed, they must acquit the defendant. That is the rule in the District of Columbia and it should have been followed in the present case, and since it was not, we are required to reverse and remand the case for a new trial.''

The failure to charge a jury as to the right and duty to return a verdict of not guilty deprived the accused of a substantial right and was prejudicial. *State v. Howell,* 10 S. E. 2d 815, 218 N. C. 280 (1940). If the books do not abound in cases on the point, it is because the proposition is so clear that trial courts do not omit the instruction. The importance of the instruction here is self-evident. As in the *McKenzie* case, the burden of the Government's case rested primarily on the veracity of Leonard. Leonard had given statements conflicting with each other and with his testimony to the F. B. I. and to the State Athletic Investigation Committee. In addition, there was evidence in this case that his reputation for veracity was bad. In the circumstances, the total failure to instruct the jury in plain terms as to the consequences of a reasonable doubt is a fundamental inadequacy in the charge which entitles the defendant to a new trial. Rule 52, Fed. Rules Crim. Pro.; cf. *Morris v. United States,* 156 F. 2d 525 (9th Cir. 1946).

3. The Court Erred in Refusing to Instruct the Jury With Respect to the Relation of the Acts and Declarations of Co-Conspirators With Respect to Establishing the Existence of a Conspiracy.

(Specification of Error No. 3.)

The point of law appellant here raises is not one as to to which either the Government or the court below was in disagreement. There is no doubt as to the law. *Glasser v. United States,* 315 U. S. 60, 75 (1942).

In fact, although the defendants requested instructions to cover the law,[5] the Court in its original charge omitted to cover the matter. Thereafter, counsel for Palermo called to the attention of the Court that it had omitted requested instructions (R. 7713). The Court conceded that it had "overlooked a few" (R. 7714). It then proceeded to instruct as follows:

> "You are instructed that in considering the guilt or innocence of the defendant Gibson you may not consider the words or conduct of any other defendant in the presence of Mr. Gibson unless you find that the prosecution has proved beyond a reasonable doubt that Mr. Gibson entered into a conspiracy with that defendant as charged in the indictment, and that the words of the other defendant were spoken in aid of and to further the purpose of the conspiracy." (R. 7714-7715)

Thereupon counsel for appellant asked that the instruction be extended to include appellant (R. 7719), and other counsel restated the correct application of the law requested (R. 7719). The Court denied the request on the mistaken thought that it had covered the point adequately (R. 7719). This left the jury with the final instruction on conspiracy given immediately preceding the Gibson instruction quoted above:

> "The question of the guilt or innocence of any defendant must be determined from the evidence which relates to him and must not be controlled or affected by testimony which relates only to other defendants." (R. 7714)

Such instruction obviously does not cover the error here noted, but indeed makes the requested instruction imperative. The refusal to correct the omission as to Palermo

5. Carbo requests Nos. 1 (TR 644), 3 (TR 646), 4 (TR 647); Sica request No. 11 (TR 705); Dragna request Nos. 4 (TR 725), 5 (TR 726); Gibson request "D" (TR 734). These were incorporated by reference in Palermo's requests (TR 683).

when a correct instruction was given as to Gibson, aggravates the harm and draws a distinction unwarranted by the record between the defendants insofar as the conspiracy counts are concerned.

It is submitted that the refusal to correctly charge on the matter in accordance with the requests of the appellant, particularly when the matter was brought to the Court's attention, and then a correction is made limited to one defendant constitutes substantial and prejudicial error requiring a new trial.

4. The Death of the Trial Judge Before Disposition of the Post-Trial Motions Requires That a New Trial Be Granted.

(Specification of Error No. 4.)

The trial judge in this case unfortunately died prior to the disposition of the post-trial motions of the defendants; indeed, he did not receive the memoranda which were to be prepared or hear the arguments in support of the motions. On October 13, 1961, Judge Boldt denied motions for new trial on the ground that the matter could proceed in his hands as successor judge in the case (TR 1342).

Rule 25, F. R. Crim. Pro., provides as follows:

> "If by reason of absence from the district, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

In *Connelly v. United States,* 249 F. 2d 576 (8th Cir. 1957), the Court said, at page 580:

> "There might well be a criminal case in which the testimony would be of such character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of credibility of the government witness was a serious issue the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character."

This appellant need not belabor what must appear to be obvious, that this is not a case in which hearing the witnesses and observing their demeanor are secondary. Even a cursory examination of the 7500-page record and the 300-odd exhibits will disclose the searching, detailed and extensive attacks upon witnesses of major and minor importance. The Government's case in chief pivots upon a single witness, Leonard, whose integrity and truthfulness are belied by the contradictory statements given by him at various times. The evidence traveled the gamut from hotly contested major issues to hotly contested collateral or minor issues. The transcribed record cannot re-create the trial, nor record the experiences, observations and necessarily unuttered thoughts of the trial judge: he was entitled to keep these to himself until the final expression of his views was called for, not by the verdict, but by the post-trial motions. To him was relegated the final authority to act, even *sua sponte,* to grant a new trial in the interest of justice. Rule 33, Fed. Rules Crim. Pro. The function of the trial judge is to bring to bear his observations and experiences during the trial in disposing of post-trial motions, to pass upon the weight of the evidence and the credibility of witnesses. In this respect, his function differs from that of the appellate court, which resolves only the question whether error was committed or discretion abused. Cf. *United States v. Beacon Musical Instrument Co.,* 135 F.

Supp. 220, 222-223 (D. Mass. 1955). Plainly, the "cold print" does not preserve the "lost evidence" witnessed by the trial judge: it "is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." *Broadcast Music v. Havana Madrid Restaurant Corp.,* 175 F. 2d 77, 80 (2d Cir. 1940). The power of a trial court with respect to a motion for a new trial is broad. *United States v. Robinson,* 71 F. Supp. 9, 10 (D. C. D. C. 1947); *United States v. Beacon Instrument Co., supra.* Indeed, the trial judge has been said to act as a thirteenth juror. *United States v. Applebaum,* 274 Fed. 43, 46 (7th Cir. 1921).

It is respectfully submitted that the successor judge here could not have brought to the consideration of the post-trial motions the requisite fund of knowledge and observation *as to this case* invoked by the motions. To the contrary, he could only act after the manner of a reviewing or appellate tribunal, but this is a different function and not the one he must fulfill.

It is submitted that Rule 25 "shows a generous attitude toward a new trial where a trial judge dies before the case is disposed of." *Brennan v. Grisso,* 198 F. 2d 532 (D. C. Cir. 1952). As much as the court below felt constrained that a long trial should not be repeated because of the untimely death of the trial judge, so also that fact should not deter the grant of a new trial in the interest of substantial justice.

5. The Appellant Palermo Adopts the Arguments, to the Extent Relevant, of Each of the Other Appellants in This Cause Without Repeating Them in This Brief.

CONCLUSION.

For the reasons stated, and the reasons stated by the other appellants in this cause, this Court should grant the appellant a new trial or judgment of acquittal.

Respectfully submitted,

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Attorneys for Appellant,
Frank Palermo.

APPENDIX A.

Relevant Statutes.

28 U. S. C.

Section 1291: Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, Sec. 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, Sec. 12(e), 72 Stat. 348.

Section 1294: Circuits in which decisions reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

* * *

18 U. S. C.

Section 371: Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

Section 875: Interstate Communications

* * *

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Section 1951: Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or to the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Rule 18, Fed. Rules Crim. Pro.:

DISTRICT AND DIVISION.

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

APPENDIX B.

Table of Exhibits.

Plaintiff's Exhibits	*For Identification*	*In Evidence*	*Rejected*
1	417	417	
2	417	417	
3	417	417	
4	417	417	
5	417	417	
6	417	417	
7	417	417	
8	417	417	
9	417	417	
10	417	417	
11	417	417	
12	417	417	
13	417	417	
14	417	417	
15	417	417	
16	417	417	
17	417	417	
18	417	417	
19	417	417	
20	417	417	
21	417	417	
22	417	417	
23	417	417	
24	417	417	
25	417	417	
26			558
26-A	1619		
27			558
28	417	417	
29	417	417	
30	417	417	

Plaintiff's Exhibits	*For Identification*	*In Evidence*	*Rejected*
31	417	417	
32	582	582	
33	582	582	
34	582	582	
35	582	582	
36	582	582	
37	582	582	
38	582	582	
39	582	582	
40	582	582	
41	582	582	
42	582	582	
43	582	582	
44	582	582	
45	582	582	

Plaintiff's Exhibits	*For Identification*	*In Evidence*
46	582	582
47	582	582
48	582	582
49	582	582
50	633	635
51	646	646
52	652	654
53	661	
54	661	
55	661	
56	666	667
57	669	669
58	725	726
59	747	748
60	762	
61	763	

Plaintiff's Exhibits	*For Identification*	*In Evidence*
62	763	
63	763	
64	763	
65	763	
66	786	788
67	786	790
68	786	790
69	1693	
70	1725	1726
71	1725	1726
73	1725	1726
74	1731	1735
75	1731	1735
76	1731	1735
77	1854	
78	1854	
79	1855	
80	2071	
81	2160	2161
82	2164	2165
83-A	2170	2171
83-B	2170	2171
84-A	2178	2179
84-B	2178	2179
85-A	2187	2189
85-B	2187	2189
85-C	2187	2189
86-A	2187	2190
86-B	2187	2190
86-C	2187	2190
86-D	2187	2190
86-E	2187	2190
87-A	2189	2190
87-B	2189	2190
88-A	2190	2191

Plaintiff's Exhibits	*For Identification*	*In Evidence*
88-B	2190	2191
89	2191	2193
90-A	2191	2193
90-B	2191	2193
91-A q	2191	2192
91-B	2191	2192
91-C	2191	2192
92-A	2192	2192
92-B	2192	2192
93	2211	
94	2224	
95	2325	
96	2337	2428
96-A	2508	
97	2337	2428
98	2339	
99	2339	
100	2343	2527
101	2344	2508
101-A	2508	
102	2358	
103	2438	
104-A	2544	2546
104-B	2544	2546
105-A	2544	2546
105-B	2544	2546
106-A	2544	2546
106-B	2544	2546
107-A	2554	2557
107-B	2554	2557
107-C	2554	2557
108-A	2565	2566
108-B	2565	2566
109-A	2565	2566
109-B	2565	2566

Plaintiff's Exhibits	*For Identification*	*In Evidence*
110-A	2569	2571
110-B	2569	2571
110-C	2569	2571
111	2603	2606
112	2603	2606
113	2603	2606
114	2619	2620
115	2619	2620
116	2636	2638
117	2636	2638
118	2636	2638
119	2724	2724
120	2725	2725
121	2725	2725
122	2915	2927
122-A	6427	6427
123	3014	
124	3015	3016
125	3232	
126	3264	
127	3668	3669
128	3788	
129 (portions)	6293 (also see Exhibit 152)	
130	3946	
131	3955	
132	4174	
133	4390	4393
134	5361	
135	5372	
136	5373	
137	5373	
138	5373	
139	5594	
140	5594	
141	5594	

Plaintiff's Exhibits	*For Identification*	*In Evidence*
142	5594	
143	5717	5725
144	6006	6494
145	6185	6190
146	6187	
147	6187	6190
148	6187	6190
149	6286	6286
150	6286	6286
150-A	6286	6286
150-B	6286	6286
151	6289	
152 (Substituted copy of portions of Exhibit 29)	6289	6323
153	6292	
154	6304	
155	6304	
156	6306	6314
157	6308	6314
158	6308	6314
159	6308	6314
160	6328	6329
161	6429	6431
162	6430	6431
163	6430	6431
164	6515	
165	6552	6553
166	6555	6556
167	6558	6558
168	6570	6571
169	6570	6571
170	6623	6631
171	6623	6627
172	6624	6627
173	6624	6630

Plaintiff's Exhibits	*For Identification*	*In Evidence*
174	6635	6636
175	6695	
176	6702	6708
177	6711	6726

Defendants' Exhibits	*For Identification*	*In Evidence*	*Rejected*
A	1121		
B	1444		
C	1568	3059	
D	1643	3059	
E	1644	3059	
F	1975		4101
G	1975		4101
H	2025		
I	2025		
J	2074		
K	2074		
L	2074		
M	3026		
N	3027		
O	3427		
P	3481	3482	
Q	3493	3498	
R	3493	3498	
S	3493	3498	
T	3493	3498	
U	3493	3498	
V	3493	3498	
W	3493	3498	
X	3523		
Y	3528		
Z	3533	3534	

Defendants' Exhibits	*For Identification*	*In Evidence*	*Rejected*
Z-1	3533	3534	
Z-2	3533	3534	
Z-3	3533	3534	
Z-4	3540	3541	
Z-5	3549	3550	
Z-6	3552	3552	
Z-7	3553	3553	
Z-8	3556	3556	
Z-9	3574	3574	
Z-10	3574	3574	
Z-11	3598		
Z-12	3609		
Z-13	3610	3611	
Z-14	3621	3622	
Z-15	3630	3635	
Z-16	3639	3635	
Z-17	3639		3639
Z-18	3639		3639
Z-19	3639		3639
Z-20	3645	3647	
Z-21	3656		3657
Z-22	3850		
Z-23	3895		3898
Z-24	3895	5108	3898
Z-25	3895	5108	3898
Z-26 Z-26	3900		
Z-27	3911		
Z-28	3911		
Z-29	4101		4101
Z-30	4101		4101
Z-31	4101		
Z-32	4101		
Z-33	4347		4349
Z-34	4347		4349
Z-35	4347		4350

Defendants' Exhibits	*For Identification*	*In Evidence*	*Rejected*
Z-36	4351		4353
Z-37	4351	5264	
Z-39	4437	4439	
Z-40	4437	4439	
Z-41	4437	4439	
Z-42	4437	4439	
Z-43	4437	4439	
Z-44	4437	4439	
Z-45	4437	4439	
Z-46	4437	4439	
Z-47	4437	4439	
Z-48	4437	4439	
Z-49	4437	4439	
Z-50	4440	4441	
Z-51	4440	4441	
Z-52	4440	4441	
Z-53	4440	4441	
Z-54	4440	4441	
Z-55	4440	4441	
Z-56	4440	4441	
Z-57	4440	4441	
Z-58	4440	4441	
Z-59	4440	4441	
Z-60	4440	4441	
Z-61	4440	4441	
Z-62	4440	4441	
Z-63	4440	4441	
Z-64	4440	4441	
Z-65	4440	4441	
Z-66	4440	4441	
Z-67	4440	4441	
Z-68	4598		
Z-69	4649	4650	
Z-70	4674		
Z-71	4675	4676	

Defendants' Exhibits	*For Identification*	*In Evidence*	*Rejected*
Z-72	5249	5254	
Z-73	5274	5277	
Z-74	5827	5277	
Z-75	5827		
Z-76	5827		
Z-77	5827		
Z-78	5827		
Z-79	5827		
Z-80	5827		
Z-81	5827	5828	
Z-82	5827	5828	
Z-83	5827	5828	
Z-84	5827	5828	
Z-85	5827	5828	
Z-86	5827	5828	
Z-87	5827	5828	
Z-88	5827	5828	
Z-89	5827	5828	
Z-90	5827	5828	
Z-91	5827	5828	
Z-92	5827	5828	
Z-93	5827	5828	
Z-94	5827	5828	
Z-95	5827	5828	
Z-96	5827	5828	
Z-97	5827	5828	
Z-98	5827	5828	
Z-99	5827	5828	
Z-100	5827	5828	
Z-101	5827	5828	
Z-102	5827	5828	
Z-103	5827	5828	
Z-104	5827	5828	
Z-105	5827	5828	
Z-106	5827	5828	

Defendants' Exhibits	*For Identification*	*In Evidence*	*Rejected*
Z-107	5827	5828	
Z-108	6250	6253	
Z-109	6250	6253	
Z-110	6250	6253	
Z-111	6656	6659	
Z-112	6659	6659	

Court's Exhibits	*For Identification*	*In Evidence*
1	43	
2	2520	
3	2647	
4	3040	
5	3936	
6	3936	
7	3936	
8	5430	
9	7628	
9-A	7628	
10	7628	

CERTIFICATE OF COMPLIANCE.

I, Jacob Kossman, counsel for appellant Frank Palermo herein, certify that I have examined the provisions of Rules 18 and 19 of the Rules of the Court and that in my opinion the tendered brief conforms to all requirements.

JACOB KOSSMAN.